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The UN Convention on the rights of persons with disabilities: New challenges for EU equality law and governance

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Submitted: February 2018

A doctoral thesis submitted to Middlesex University in partial fulfillment of the requirements for the degree of PhD.

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"The Convention on the Rights of Persons with Disabilities will mark the beginning of a new era in which they will have the same rights and opportunities as everyone else"
UN Secretary-General 1997-2006, Kofi Annan

CHAPTER 1

INTRODUCTION

1. Introducing the CRPD and the overall research

The present research aims to analyse the impact of the UN Convention on the Rights of Persons with Disabilities (CRPD hereinafter) on the EU legal order and governance. To this end, it will focus on three different dimensions: international human rights law, EU law and domestic law.

The CRPD was formally adopted by the UN General Assembly in December 2006 and entered into force in May 2008.[1] It represents the first human rights Convention introduced in the new millennium and the most recent enforceable instrument provided by the United Nations in the context of the international human rights protection. The Convention is also the first human treaty to be open for signature by regional integration organisations and the European Union become a party to the CPRD in November 2009. It is worth noting that the CRPD has now been signed by 160 countries worldwide and ratified by 174.[2] This means that it is one of the most widely ratified international treaties which can effectively and positively address the rights of persons with disabilities across the globe.[3] In particular, the EU's ratification of the Convention establishes a clear obligation in law for its provisions to be taken into account in interpreting EU primary and secondary legislation.

[1] Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007). The Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007.
[2] Data provided by the UN Division for Social Policy and Development Disability.
[3] S. Quinlivan, 'The United Nations Convention on the Rights of Persons with Disabilities: An Introduction' (2012) 13 *ERA Forum* 71.

The Convention does not introduce new rights under international human rights law, but it seeks to ensure the correct interpretation and implementation of existing human rights obligations.[4] The primary objective of the Convention is to obligate States Parties to provide general measures in order to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, Article 4 demands "the adoption of all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention, including the necessary legislation to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities".

The CRPD represents a remarkable improvement to the legal protection of the rights of persons with disabilities. It embraces a human rights approach according to which persons with disabilities are considered as rights bearers who can enjoy all human rights and fundamental freedoms on an equal basis with others. This understanding of disability rejects the traditional social welfare or medical model that depicts certain categories of individuals as objects of pity and charity.[5] In order to achieve the ambitious goals of the human rights approach, the CRPD enshrines a substantive model of equality that acknowledges diversity and aims to ensure that individuals in different situations are treated differently. By doing so, it moves away from the formal concept of equality in accordance with "things that are alike should be treated alike".[6] This approach fails to address the concrete differences of vulnerable groups of individuals and does not confer a right or a benefit on the basis of a personal or physical characteristic. The cornerstone of the substantive model of equality adopted by the CRPD is the obligation to provide reasonable accommodation for persons with disabilities. This duty is crucial to enable persons with disabilities to have access to, participate in, or advance in

[4] G. Quinn, The United Nations Convention on the rights of persons with disabilities: toward a new international politics of disability (2009-2010) 15 *Texas Journal on Civil Liberties & Civil Rights* 33.
[5] M. Stein and P. Stein, Beyond disability rights (2007) 58 *Hastings Law Journal* 1203.
[6] Aristotle, 3 *Ethica Nicomachea*, 112-117, 1131a-1131b, Ackrill, J. L. and Urmson J. O. (eds.), W. Ross translation, (Oxford University Press, 1980).

employment. It requires an adjustment or a modification of the environment to accommodate the specific needs or characteristics of persons with disabilities and eliminate such disadvantages in comparison with others.

Against this background, it may be argued that the CRPD shows the legal potential to improve the protection of persons with disabilities by clarifying and broadening the personal and material scope of the existing instruments of international human rights law.

2. Research questions and objectives: EU equality law

This research has been guided by the following research questions:

1. How is the CRPD impacting the legal protection of persons with disabilities in the EU legal order?
2. Does EU equality law comply with international human rights law?
3. Is the CJEU's understanding of the prohibition of discrimination in line with the CRPD?
4. What is the legal status of the CRPD in the EU legal framework?
5. What is the state of play of the proposed Horizontal Directive?

The central goal of this research is to critically assess the impact of the CRPD on EU equality law and the extent to which the CRPD has influenced the current EU legal framework with a particular focus on the implementation of the Directive 2000/78/EC.[7] The Framework Equality Framework Directive is the main piece of EU legislation that aims to combat discrimination on grounds of disability in the workplace. It embodies a specific prohibition of direct and indirect discrimination on grounds of disability (Article 2) and the obligation to provide reasonable accommodation (Article 5). The research objective is to examine whether the judicial interpretation of the Court of Justice of the

[7] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

European Union (CJEU) with regard to the Directive 2000/78 does or does not comply with the new legal background delineated by the CRPD. The case law of the CJEU that concerns the implementation of the prohibition of discrimination on grounds of disability will also be critically analysed.

The EU ratification of an international human rights treaty represents an unprecedented event which raises several issues in terms of the legal validity and effects of the CRPD's provisions. This research will therefore seek to examine the interplay between the CRPD and EU law in order to identify the legal status of the Convention within the EU legal framework. The judicial reasoning and understanding of the Convention will be assessed by taking into account the most relevant CJEU's judgements.

This study will also investigate the evolution of the legislative process that characterises the so-called Horizontal Directive.[8] In 2008, the Commission presented a proposal for a Directive which addresses discrimination on grounds of disability, religion or belief, age or sexual orientation in both the public and private sector, concerning access to social protection, education, goods and services. It sets out a general framework to combat discrimination beyond the field of employment and occupation by means of a horizontal approach. However, eight years after the Commission issued its proposal, negotiations are still under way. This doctoral thesis aims to identify the main political and legal obstacles that jeopardise the final adoption of the Horizontal Directive via an analysis of the legislative process and the substantive content of last version of the Council's draft.

2.1 EU governance

Another research objective of the present study is to analyse how the EU accession to the CRPD is affecting EU governance. In this regard, this research will answer the following key questions:

[8] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation [2008] COM/2008/0426.

1. Does the EU independent framework provide an effective mechanism to monitor the CRPD's implementation?
2. Is the open method of coordination an appropriate governance model to monitor the CPRD's implementation?

It is worth noting that the Convention encompasses a new mechanism to monitor its implementation at regional and national levels.[9] Article 33 of the CRPD requires a monitoring framework that includes: i) a national or regional focal point; ii) an independent mechanism to promote, protect and monitor the implementation of the Convention; iii) civil society organisations. As a result, the EU established an independent framework to monitor the CRPD that involves the European Parliament Petitions Committee (PETI), the European Ombudsman, the European Commission, the EU Agency for Fundamental Rights (FRA) and the European Disability Forum (EDF). This comprehensive framework operates in the legislative and policy sector falling within the scope of EU powers.

This study will argue that the monitoring system required by Article 33 CRPD reflects mechanisms and procedures which are usually associated with experimentalist governance. The EU has crafted a governance model that mirrors the open method of coordination (OMC). The OMC is a system to coordinate policies among Member States through procedures of soft law with the purpose of achieving EU objectives.[10] The participation of different actors, such as civil society organisation and stakeholders, is considered a positive and innovative characteristic of the decision-making process provided by the OMC.

This research intends to assess the functions of the EU institutions involved in the governance mechanisms to monitor the CRPD's implementation. In particular, it will examine whether the European Parliament and civil society organisations are influential within the EU independent

[9] G. De Beco, Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: another role for national human rights institutions? (2011) 29 Netherlands Quarterly Human Rights, 84.
[10] C. M. Radaelli, The Open Method of Coordination: A new governance architecture for the European Union, Swedish Institute for European Policy Studies (2003).

framework. The final objective is to evaluate the effectiveness of the governance mechanisms adopted by the EU to monitor the implementation of the CRPD.

2.2 International human rights law and global governance

The research questions are the following:

1. Has the CPRD introduced an innovative paradigm of substantive equality and non-discrimination under international human rights law?
2. Is the model of participatory democracy adopted by the CRPD feasible for improving the EU decision-making process?

To fully understand the impact of the CRPD on EU equality law, this research will also outline the main legal developments introduced by the Convention in the area of non-discrimination and equality. The analysis will focus on the theoretical framework of equality provided by the CRPD and other international human rights treaties. Specific attention will be given to the model of substantive equality, the obligation to provide reasonable accommodation and the concept of multiple and intersectional discrimination. The theoretical background of the CRPD lays the foundations for the whole research that will examine the implementation of the prohibition of discrimination on grounds of disability in the workplace at EU and national level. The principle of equality and non-discrimination falling under Article 5 of the CPRD constitutes the lens through which this study will explore the legal protection of persons with disabilities.

In addition, the Convention promotes the inclusion of civil society organisations and persons with disabilities in the decision-making process (Article 4.3). An overview of the emergence of civil society groups in the global governance will be given in order to assess to what extent NGOs can inform and improve the decision-making process at international level. This study will embrace a concept of global governance intended "as a process and a state whereby public and private actors

engage in the international regulation of societal relationships and conflicts".[11] It will be shown that the CRPD enshrines a model of participatory democracy that requires the involvement of all relevant stakeholders in the entire policy chain, from conception to implementation, on the basis of an inclusive approach. This approach reflects the model of participatory democracy embodied in Article 15 of the TFEU according to which "the Union's institutions, bodies, offices and agencies conduct their work as openly as possible in order to ensure the participation of civil society and thus promote good governance". It will be submitted that the CRPD is a positive model when it comes to promoting the structured participation of civil society groups in the EU decision-making process.

2.3 National case studies

A crucial objective of the CRPD is the promotion of the rights of persons with disabilities in the open labour market. Article 27 of the Convention lays down that States Parties have to recognise the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and a work environment that are open, inclusive and accessible to persons with disabilities. The main provision to ensure the right to work is the duty to provide reasonable accommodations for persons with disabilities in the workplace (Art. 27(i)). The concept of reasonable accommodation is specifically defined by the UN Convention and includes all the necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

This research sought to investigate the implementation of the duty to provide reasonable accommodation at national level so as to identify the impact of the CRPD on national legal system by underlying positive and negative judicial practices with regard to the interpretation of the

[11] B. Kohler-Koch, B. Rittenberger, Review Article: the Governance turn in EU studies (2006) 3 Journal of Common Market Studies, 205.

obligation to accommodate persons with disabilities in the workplace. To this end, this study has adopted a comparative approach and will offer a comparative assessment of disability equality law in the US and Canada, the UK and Italy.

The key research questions are:

1. Does the American Disability Act (ADA) effectively foster the protection of persons with disabilities?
2. What are the main differences in the US and Canada in relation to the concept of disability and the duty to accommodate?
3. How has the duty to accommodate been implemented in the UK and Italy and may one of these two legal systems be said to offer a better implementation model?

The US and Canada were selected primarily due to the fruitful nature of a comparison between two federal systems offering a different approach; the US benefits from a comprehensive piece of legislation, i.e., the American Disability Act (ADA), whereas Canada lacks an overarching act for the protection of persons with disabilities. An account of American disability law is also crucial to understand EU equality law, as it has been shaped in part by legal developments in the US as well as other legal systems. To quote Gerard Quinn and Eilionòir Flynn, "the past, present and future of EU disability law and policy are a story of intellectual borrowings, of takings and givings".[12] US and EU disability discrimination laws are highly interconnected in terms of legal principles and judicial practices. The "civil rights" model of disability that underpins discrimination law in the United States has been absorbed within the EU legal framework and enshrined in the Framework Equality Directive.

[12] G. Quinn & E. Flynn, "Transatlantic borrowings: the past and future of EU non-discrimination Law and Policy on the ground of disability" (2012) 60 *American Journal of Comparative Law* 23.

The inclusion of the UK and Italy in this study is also useful to the extent that it allows for a comparison between a system where a national piece of legislation (i.e. the UK Equality Act) is implemented in compliance with the CPRD to a national legal system lacking an exhaustive legislation in relation to disability. While UK Equality law encompasses a comprehensive piece of legislation to tackle discrimination, Italy is characterised by a 'fragmented' and unharmonised legal framework in the field of equality and non-discrimination. This comparative analysis will also help identify the different implementation of the CRPD at national level, by considering the pure dualist system of the UK and the monistic legal system of Italy that promotes the integration of supranational and domestic norms.

To sum up, the overall comparative approach seeks to analyse the extent to which comprehensive and horizontal pieces of legislations can facilitate or improve the protection of persons with disabilities at national level. The final objective of this research is to identify positive and negative practices as regards the implementation of the obligation to provide reasonable accommodation on the workplace.

3. Thesis structure

The present doctoral thesis is composed of three main parts. Part one offers an analysis of the international legal framework (Chapter 2), while Part two focuses on EU law and governance (Chapters 3 and 4). Part three covers national cases studies (Chapters 5 and 6).

Chapter two (this introduction being Chapter 1) will examine two main subjects: the substantive concept of equality and non-discrimination on grounds of disability and the model of participatory democracy underpinning the CRPD. An overview of the development of the notion of equality under international human rights law will be offered. The theoretical model of equality enshrined in the CRPD will be the main point of reference to interpret and critically analyse the equality and non-discrimination norms of the EU legal framework. The Convention embraces a comprehensive and

transformative concept of equality which takes into account the specific differences of vulnerable groups and reinforce the legal protection of persons with disabilities. This approach is characterised by an overarching definition of direct and indirect discriminations (Art. 2), the objective to ensure multidimensional equality (Arts. 6 – 7), the fundamental obligation to provide reasonable accommodation (Art. 2) and the duty to launch affirmative action programs (Art. 27).[13] The Convention not only abandons the asymmetrical model of equality, but it formalises a substantive paradigm of equality which addresses those structural disadvantages that jeopardise the full enjoyment of fundamental rights. Moreover, the CRPD's adoption symbolises a positive practice of participatory democracy which offers significant guidelines to structure the participation of civil society in the EU political decision-making process. In this regard, the extent to which civil society organisations contributed to shape the final draft of the CRPD will be illustrated. Participatory democracy enhances the legitimacy and transparency of international governance by opening up decisional procedures and involving more experts and organisations in adopting and delivering policy. The unprecedented level of participation of civil society groups in the CRPD's negotiations brought about significant results with regard to the legal protection of persons with disabilities. In particular, the adoption of a social model of disability and the concept of multiple discrimination are mainly due to the lobbying activities of civil society organisations. The CRPD highlights the beneficial outcomes of consulting civil society in the decision-making process and may represent good practice to foster participatory democracy at EU level. The CPRD's negotiations show that the participation of civil society groups in the decision-making process should be structured on the basis of precise and formal rules that ensure the "representativeness" and "expertise" of civil society organisations.

[13] O.M. Arnardottir, A future of multidimensional Disadvantage Equality? in O.M. Arnardottir & G. Quinn (Eds.) *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives*, pp. 320 (Leiden: Martinus Nijhoff, 2009).

Chapter three will provide a comprehensive overview of the prohibition of discrimination on grounds of disability under EU equality law. In particular, the legal meaning of disability, the concept of multiple and intersectional discrimination and the obligation to provide reasonable accommodation will be examined. To this end, the CJEU's leading cases will be critically explored and the legal status of the CPRD under EU law will be assessed. This research will demonstrate that the CJEU is gradually moving away from the social model of disability and the substantive paradigm of equality embraced by the CRPD. The CJEU wrongfully focuses its analysis on the individual impairment itself rather than on the final consequences of the deficiency. The return to an outdated medical model of disability reveals a cautious and conservative approach of the CJEU that narrows the substantive content of EU equality law. The Court's judgements also exhibit an inadequate approach with regard to multiple and intersectional discrimination. The CJEU's reasoning reflects a flaw in the EU legal order which is still characterised by a single-ground equality paradigm. The lack of a legal instrument which recognises discriminations based on the intersection of two or more grounds compromises the effective protection of vulnerable individuals and leaves a significant gap in the EU legal framework. Last but not least, a critical assessment of the political and legal developments of the pending proposal for a new Directive regarding equality and non-discrimination on grounds of disability beyond the employment area will be offered. It will be shown that the last Council instrument is not fully in line with the CRPD. The Council's draft significantly diverges from the initial Commission proposal and disregards the major amendments presented by the Parliament. The Council's last instrument leaves out the field of 'social advantages', the 'anticipatory' obligation to provide reasonable accommodation on workplace and the prohibition of multiple and intersectional discrimination from the scope of the Directive. This approach of the Council reflects a political compromise that privileges those Member States which would be the most affected by the Directive's adoption.

Chapter four will focus on EU governance and the independent framework for promoting, protecting and monitoring the CRPD at EU level. This chapter will explore whether the governance mechanisms

adopted by the EU are effectively fostering the implementation of the CPRD. The mechanisms established according to Article 33 CRPD marginalise the European Parliament, the body closest to European citizens and civil society organisations, which lacks formal structures to adequately monitor the CRPD's implementation. In addition, this research found that the main shortcoming of the existing EU independent framework is represented by the reporting and benchmarking process. The majority of Member States fail to regularly produce clear and analytical evidence with regard to the implementation of disability policies. As a result, the Commission cannot carry out rigorous assessments of the rights of persons with disabilities at national level. The reporting methods and the coordination mechanisms of the open method of coordination should be improved in order to effectively mainstream disability in the EU. To this end, i) the objectives of the Disability Strategy 2010-2020 should be enhanced by developing precise timeframes and key performance indicators; ii) clear procedures and deterrents should be introduced to penalise non-cooperation of the Member States and iii) precise responsibilities and duties should be assigned to the EU bodies that participate in the open method of coordination.

Chapter five adopts a comparative approach to illustrate how the duty to provide reasonable accommodation is applied beyond the EU legal context. In this regard, the judicial interpretation of the concept of disability and the obligation to accommodate in the U.S and Canada will be analysed. This chapter highlights how American Courts still embrace a formal model of equality, whereas the Canadian Supreme Court handed down promising decisions that promote substantive equality and a social understanding of disability in compliance with the CRPD. American judges are reluctant to apply a socio-political model of disability according to which disability results from the failure of society to advance the rights of persons with disabilities. In addition, the US Supreme Court merely considers the obligation to provide reasonable accommodations as a "charitable" provision that aims to ensure preferential treatments for persons with disabilities and places burdensome obligations on employees. By contrast, the Canadian Supreme Court rightfully endorses a concept of reasonable

accommodation that requires a structural change of the legal framework by removing able-bodied norms and introducing diversity in all new norms.[14] It also adopts a *flexible* and *open* concept of disability that takes into account several factors such as the subjective component of being considered disabled and those biomedical, social or technological elements that are continuously evolving in society. The judicial interpretation of the Canadian Supreme Court may constitute a leading model for the judiciary to implement substantive equality at national and international level.

Chapter six will offer a comparative assessment of the legal framework regarding disability equality law in the UK and Italy. The primary aim of this chapter is to explore the impact of the CPRD at national level by taking into account the main judgements in relation to reasonable accommodation in order to determine best practices. The legal content and the limit of the obligation to provide reasonable accommodation will be examined. This chapter describes how British courts are gradually rejecting the substantive model of equality adopted by the House of Lords in *Archibald.* The cases examined prove that reasonable accommodations are often perceived more as a privilege rather than a right of workers with disabilities in the UK legal order. Italian courts, on the other hand, are positively promoting an *objective* and *functional* understanding of the duty to provide reasonable accommodation which takes into account both the necessity of removing a particular barrier for the worker with disabilities and the proportionality of the measure that should not impose an undue burden on the employer. Moreover, this chapter illustrates that the CRPD and EU equality law have a more relevant impact in the Italian legal framework compared to the British one. UK courts do not make references to the Convention in order to interpret the concept of reasonable accommodation. This approach compromises the legal protection of persons with disabilities and does not contribute to improve the interpretation of the Equality Act. UK judges also hesitate to specifically mention EU law provisions when deciding cases affecting the rights of persons with disabilities. The UK judiciary

[14] D. Pothier, Tackling disability discrimination at work: toward a systemic approach, (2010) 4 *McGill Journal of Law and Health* 1.

is characterised by the emergence of a "protectionist" approach with regard to supranational law that reduces the impact of EU and international law in the domestic system. By contrast, Italian judges are more likely to explicitly refer to the provisions of international law when deciding legal issues that are not properly regulated at national level. This approach reflects the fact that international obligations have an "infra-constitutional" nature and must be considered as interposed standards between the Constitution and ordinary law. To the same extent, Italian judges explicitly mention CJEU's judgements and the Directive 2000/78 to define the concept of reasonable accommodation. The Italian legal framework promotes a monistic approach that recognises the coexistence of supranational norms which can permeate the domestic legal order.

Chapter seven will offer a final evaluation and summary of the main findings of the overall research. The final chapter will provide critical remarks and recommendations on how to improve the legal understanding and interpretation of the prohibition of discrimination on grounds of disability.

4. Methodology: Doctrinal and comparative approaches

The present study is based on a traditional doctrinal approach which provides a systematic review of the rules governing disability equality law and examines the interplay between those rules.[15] It will illustrate the main areas of difficulty in order to identify legal gaps and suggest future developments with regard to the interpretation of those norms. To this end, the analysis will focus on the primary sources of the law: treaties, primary and secondary legislation as well as case law.[16] This method seeks to recognise the nature and content of international and EU law that address the rights of persons with disabilities. However, doctrinal research does not aim to merely locate secondary information,

[15] T. Hutchinson and N. Duncan, Defining and describing what we do: doctrinal legal research (2012) 17 *Deakin law review* 83.
[16] See for instance, M.H. Redish, 'The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine' (1985) 85 *Columbia Law Review* 1378.

but to enable scholars to offer a critical and transversal analysis of the primary sources of legal doctrine.[17]

The present doctoral thesis will therefore take into account leading judgements of the UN Committee on the Rights of Persons with Disabilities and of the CJEU in relation to the prohibition of discrimination on grounds of disability. The judicial understanding of the concept of equality will be critically examined and linked to those international and EU legal instruments that ensure the protection of persons with disabilities. This research will clarify the current state of law by providing a comprehensive and coherent presentation of disability equality law at international, European and national levels. In order to interpret and examine primary sources, the present study will also rely on legal scholarship and the research carried out by international civil society organisations in relation to the implementation of the CRPD.

The traditional doctrinal methodology will be combined with the comparative legal approach which represents a valuable instrument of learning and knowledge.[18] By comparing the law of one country with another, commonalities and key dissimilarities between different legal systems may be identified.[19] To the same extent, the close examination of those divergent approaches adopted by national courts in relation to similar norms may assist to determine the appropriate understanding (or not) of certain legal obligations.

This comparative method will be employed when analysing the impact of the CRPD and EU law at national level. This will give a specific understanding of how equality obligations and, in particular, the obligation to provide reasonable accommodation has been concretely implemented by national judges. The comparison of different models of disability legislation and judicial reasoning concerning equality will be used to underline the existence of various legal frameworks delineated by Member

[17] T. Hutchinson, *Researching and Writing in Law* (Reuters Thomson, 3rd ed, 2010), p. 7.
[18] J. M. Smit, *Elgar Encyclopedia of Comparative Law* (Elgar Publsihing, Second edition, 2006).
[19] G. Samuel, 'Comparative Law and Jurisprudence' (1998) 47(4) *International and Comparative Law Quarterly* 817, 825.

States to protect persons with disabilities. Moreover, the comparative approach will allow us to draw lessons and good practices at national level with the purpose to evaluate the effectiveness of those laws introduced by State Parties under the CRPD. The comparative research will not be limited to a mere comparison of legal rules, but will also take into account the way the law has been interpreted in practice by courts.[20] The choice to compare two European countries, in this case the UK and Italy, derives from the objective to evaluate the process of harmonising disability equality law within the EU legal system. By contrast, the comparison between the U.S. and Canada aims to assess how disability law is applied beyond the EU context and to what extent the American legal framework has influenced EU equality law.

An analytical method will be adopted to examine the obligation to provide reasonable accommodation in different legal systems and detect common parts and differences in the understanding of this duty. This approach implies the identification of an 'ideal type' that will allow ranking legal concepts and rules on a scale according to the degree they fit with the core characteristics of the 'ideal type'.[21] The ideal concept of reasonable accommodation is embodied in the CRPD and will be used to verify whether or not national judges are interpreting the obligation to accommodate in line with the core characteristics enshrined in the Convention.

5. Filling the research gaps

This doctoral thesis identifies research gaps with regard to: i) the implications of the CRPD for EU equality law; ii) the status of the CRPD within the EU legal order; iii) the functioning of the EU independent framework to monitor the CRPD's implementation and; iv) the potential influence of the CRPD at national level.

[20] M. Van Hoecke, Methodology of Comparative Legal Research (2015) *Law and Method* 1.
[21] *Ibid*, p. 28.

Leading scholars have written extensively in relation to disability discrimination at EU level, in particular with regard to the concept of disability.[22] However, the existing research lacks to point out the exact sphere of application and the main limits of EU equality norms. This research contributes to the academic debate on the implementation of disability rights in the EU system by comprehensively analysing all the CJEU's judgements addressing the prohibition of discrimination on grounds of disability. The controversial evolution of the CJEU's interpretation of the personal scope of the Directive 2000/78 will be examined and a critical analysis of the single-ground approach of EU equality law will be provided. The CJEU's reluctance in embracing the social model of disability and the substantive paradigm of equality demonstrates that the CPRD is not fully producing its potential to substantially improve the protection of the rights of persons with disabilities in the EU.

In addition, this doctoral thesis aims to bridge the research gaps which concern the correct examination of the legal relevance of the CPRD in the EU legal system. The EU, for the first time in its history, ratified an international human rights treaty, yet it remains unclear to what extent the CRPD produces legal effects into the EU. This research will attempt to fill this gap by taking into account (and criticising) the CJEU's reasoning and the provisions of EU Treaties. In this regard, the CJEU is narrowing the chances to invoke international norms and challenge rules of EU law by demanding the assessment of 'unconditional and sufficiently precise' international provisions. This

[22] See for instance, S. Quinlivan, S and C. Bruton, C., (2017) 'Defining Disability in the Employment Context: Perspectives from the CRPD & European Union Anti-discrimination Law' In: *The UN Convention on the Rights of Persons with Disabilities: Comparative, Regional and Thematic Perspectives*. Dublin: Clarus Press; A. Hendriks, The UN disability convention and multiple discrimination: should EU nondiscrimination law be modeled accordingly? (2010) 2 *European Yearbook of Disability Law* 7; D. Ferri, The conclusion of the UN convention on the rights of persons with disabilities and the EC/EU: a constitutional perspective, (2010) 2 *European Yearbook of Disability Law* 47; G. Quinn & E. Flynn, "Transatlantic borrowings: the past and future of EU non-discrimination law and policy on the ground of disability" (2012) 60 *American Journal of Comparative law* 23; G. Quinn, O. M. Arnardóttir, *The UN Convention on the rights of persons with disabilities European and Scandinavian perspective*, (Nijhoff, 2009.); L. Waddington, "The European Union and the United Nations Convention on the rights of persons with disabilities: a story of exclusive and shared competences" (2011) 18 *Maastricht Journal of European & Comparative law* 431.

'protectionist' and 'minimalist' approach wrongfully limits the direct effect of international agreements in the EU legal framework.

This research also investigates how the EU is monitoring the implementation of the CRPD. Existing research does not provide a complete analysis of the current governance mechanisms adopted at EU level to monitor the CRPD. Several studies have been carried out to examine the national mechanisms to implement the Convention, however there is still no broad assessment of the functioning of the EU independent framework to monitor the CRPD's implementation.[23] It will be argued that the open method of coordination is not the most appropriate solution to effectively implement the CRPD, but the improvement of certain governance mechanisms will foster the achievement of the Disability Strategy objectives.

To conclude, national case studies will be considered and explored to determine the influence of the CRPD in domestic legal systems. The study will fill existing research gaps in the area of disability equality law that lack specific comparative analyses of how national courts are concretely interpreting the core equality obligations embodied under EU law and the CRPD. In particular, disability equality law is still not properly identified as an independent discipline under Italian law and academic research in this field is very limited. Disability equality law should be recognised as a valuable and autonomous discipline that requires a comprehensive and systematic piece of legislation according to international human rights law. This research will therefore put emphasis on the judicial understanding of the obligation to provide reasonable accommodation in order to promote good practices that may be taken into consideration by lawmakers and academic scholars. It is worth noting that the approach of Italian courts towards the CRPD may gradually improve the protection of the

[23] See for instance, G. De Beco, Article 33(2) of the Convention on the rights of persons with disabilities: another role for national human rights institutions? (2011) 29/1 *Netherlands Quarterly of Human Rights* 84; G. De Beco, *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe* (The Regional Office for Europe of the UN High Commissioner for Human Rights 2014).

rights of persons with disabilities and align the interpretation of domestic equality norms with international human right law.

The overall research finds that EU equality law still requires significant changes and improvements to fully comply with the CRPD and strengthen the legal protection of persons with disabilities. In this regard, the EU legislator is called to enact a new piece of legislation that takes into account the fundamental developments introduced by the CRPD in the fields of disability and equality law. To the same extent, the CJEU should abandon its resistance in applying the social model of disability by embracing a substantive approach towards equality that addresses multiple and intersectional discrimination and structural disadvantages existing in society.

CHAPTER 2

THE CRPD: A NEW APPROACH TO EQUALITY AND GOVERNANCE

1. Equality and non-discrimination: a new approach for disabilities rights

The UN Convention on the Rights of Persons with Disabilities (CRPD) is the most complex human rights treaty ever drafted. It mainstreams equality, intersectional diversity and inclusion. In doing so, the CRPD reflects the remarkable evolution of international human rights law as regards the concept of equality and the prohibition of discrimination. To put it differently, the Convention may be said to crystallise the legal shift from a formal approach of equality to a substantive and asymmetrical model of equality and non-discrimination. Indeed, these fundamental principles underpin the entire Convention and bring together socio-economic rights with civil and political rights.[24]

In this context, discriminations on the basis of disability are recognised as serious violations of the inherent dignity and worth of the human person. The legal backdrop delineated by the CRPD places the protection of persons with disabilities at the heart of international human rights law and definitively acknowledges disability as a ground of discrimination. The main purpose of the Convention is to promote the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. To this end, States are obligated to provide general measures in order to ensure and promote the full realisation of all human rights for persons with disabilities without discrimination of any kind on the basis of disability, including the necessary legislation to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.

[24] G. Quinn & E. Flynn., "Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability" (2012) 60 *American Journal of Comparative Law* 23.

The principle of non-discrimination is embodied within the general values underlying the entire Convention:

> a) respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
>
> b) non-discrimination;
>
> c) full and effective participation and inclusion in society;
>
> d) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
>
> e) equality of opportunity;
>
> f) accessibility;
>
> g) equality between men and women;
>
> h) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.[25]

Equality norms and the prohibition of discrimination represent essential legal tools to achieve an effective and solid framework for the protection of persons with disabilities. Normative acts and policies often trigger discrimination against particular groups of individuals. For this reason, the principle of equality includes procedural and substantive rules to prevent and address human rights' violations.

The principle of equality constitutes the fundamental lens through which human rights issues will be investigated in the present research. Equality is indeed a structural principle that provides a systematic analytical framework to assess and examine the protection of human rights.[26] The main theoretical and practical features of the concept of equality and non-discrimination under international human rights law will now be underlined. The aim is to outline the conceptual background that will assist the analysis of the rights of persons with disabilities at EU and national level.

[25] Art. 3 of the Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106).
[26] J. Clifford, 'Equality' in D. Sheldon, *The Oxford Handbook of International human rights law* (Oxford university press 2013), p. 421.

2. The complex and intriguing evolution of the right to equality in international law

International law encompasses an ever-changing and complex concept of equality, which is deeply rooted in the norms for the protection of human rights. However, equality does not find a comprehensive and clear definition in international law. As such, it has been subject to an intense doctrinal debate. Indeed, theoretically speaking, the international legal order is characterised by the controversial coexistence of two different approaches: formal and substantive equality.

According to the Aristotle's notion of formal equality, "things that are alike should be treated alike".[27] By contrast, the substantive equality's model points out that treating individuals alike despite disadvantage or discrimination does not tackle inequality.[28] These two separate approaches entail a distinction between negative and positives duties to promote equality. On one hand, civil and political rights merely trigger duties of restraint which prevent the State from interfering with individual freedom. On the other hand, socio-economic equality requires specific and positive duties on the State in order to eliminate discriminations and disadvantages.[29]

This theoretical framework shows that the concept of equality is profoundly interwoven with the prohibition of discrimination. The principle of equality indeed demands that equal situations are treated equally and unequal situations differently. Failure to comply with this obligation will amount to discrimination unless the difference of treatment cannot be justified objectively and reasonably by a legitimate aim.[30] This implies that not every distinction or difference of treatment amounts to

[27] Aristotle, '3 Ethica Nicomachea, 112-117, 1131a-1131b, Ackrill, J. L. and Urmson J. O. (eds.), W. Ross, Translation, Oxford University Press, 1980.
[28] S. Fredman, Human Rights Transformed: Positive Rights and Positive Duties (Oxford University Press, 2008). See also, C. Barnard and B. Hepple, Substantive equality (2010) 59 Cambridge Law Journal 562.
[29] *Ibid.* It is worth noting that the distinction between civil and political rights and socio-economic rights is not strictly accurate in the light of the new developments of international human rights law. The CRPD requires positive actions and affirmative programmes also in relation to those civil and political rights which are merely associated to duties of restraints. For instance, the civil and political right to a fair trial for persons with disabilities would involve significant investments from the State to implement procedural accommodation, physical, informational and communicational accessibility and ensure the training of court staff, judges, police officers and prison staff.
[30] See Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report, (ETS No. 177), para. 15.

discrimination. For instance, the European Court of Human Rights, in the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, concluded that: "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'".[31] It is thus commonly recognised that equality and non-discrimination are positive and negative statements of the same principle.[32]

The development of the notion of equality under international human rights law will now be illustrated. It will be briefly shown that the CRPD's provisions mirror the significant evolution occurred in legal theory and practice with regard to the notion of equality.

2.1 The controversial "sameness" model

The formal model of equality is also referred to as the "sameness" or symmetrical approach.[33] It is based on the idea that equals have to be treated equally and unequal unequally. In doing so, it ignores the personal characteristics of an individual. The fundamental principle that sustains the entire paradigm of formal equality is the concept of equality before the law in accordance with all are equal before the law and are entitled without any discrimination to equal protection of the law.[34] The approach of *de jure* equality avoids conferring a right or a benefit on the basis of a personal or physical characteristic. Indeed, it only forbids direct discriminations which occur when a person is treated less favourable than another in a comparable situation on specific grounds, such as race, sex or disability.[35] In this regard, the treatment must be different in relation to a comparable circumstance or it must be

[31] *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgement of 28 May 1985, ECHR, Series A, No. 94, paragraph 72.
[32] A. Bayefsky, The Principle of Equality and Non-Discrimination in International Law (1990) 11 *Human Rights Law Journal* 1.
[33] O. M. Arnardóttir, A Future of Multidimensional Disadvantage Equality? in O.M Arnardottir and G. Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009), p. 41-66.
[34] Article 7 of the Universal Declaration of Human Rights adopted 10 December 1948 UNGA Res 217 A(III).
[35] L. Waddington and A. Hendriks, The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination (2002) 18 *The International Journal of Comparative Labour Law and Industrial Relations* 403.

similar in comparison with a different situation. However, not all the different treatments are deemed discriminatory, but only those measures which lack a legitimate purpose in light of the democratic principles that regulate the social and legal order.[36]

The idea of formal equality comprises a concept of procedural justice which does not assure the realisation of any specific result. This approach does not address the concrete differences of certain vulnerable groups of individuals and fails to ensure the effective achievement of equality. The application of a principle of equality, merely intended as consistent treatment, does not imply an assessment of the legitimacy of the law, allowing the possibility to apply equally an unfair legal act. For instance, according to Catherine Barnard, the requirement for equal treatment could be fulfilled also by depriving both the persons compared of a particular benefit as well as by conferring the benefit on them both.[37]

In a famous decision of the European Court of Justice, *Smith v Avdel Systems Ltd*, it was ruled that equalisation in pension age can be secured by either upwards or downwards equalisation (for instance increasing the women's age to that of men).[38] This judgement strictly applied the concept of equality and laid down the compatibility of the legislation rising the pension age to 65 for women. It represents a concrete implementation of the so-called principle of levelling down.[39] This canon of protection aims to remove inequality through a levelling-down process which worsens the situation of the advantaged group to the same level of the disadvantaged one.[40] Consequently, this approach merely risks perpetuating unlawful discriminations and exacerbating the conditions of a particular group, instead of enhancing the real situation of those individuals who are more assailable.

[36] S. Besson, The principle of non-discrimination in the Convention on the Right of the Child (2005) 13 *International Journal of Children's Rights* 433.
[37] C. Barnard, *EC Employment Law* (2006, Oxford University Press).
[38] Case of *Smith v. Avdel* [1994] C–408/92, ECR I–4435.
[39] E. Howard, The EU Race Directive, Developing the protection against racial discrimination within EU (Routledge, 2010).
[40] D. L. Brake, When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law (2004) 46 *William & Mary Law Review* 513.

2.1.1 *Embracing the symmetrical approach at international level*

At the international level, the symmetrical approach to equality and non-discrimination noticeably influenced the adoption of the first human rights treaties, such as the Universal Declarations of Human Rights (UDHR), the European Convention on Human Rights (ECHR) and the two United Nations Covenants: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).[41]

The UDHR expressly introduced the prohibition of non-discrimination as a fundamental clause applying to everyone, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[42] This provision acquired a significant role in the context of international law and it has been acknowledged as a norm of customary international law in the dissenting opinion of the judge Tanaka of the ICJ.[43] Article 7 of the Declaration sets forth the right to equality, according to which "all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".

The same model of equality has been adopted in the ICCPR; for instance Article 26 reflects those identical words and structure of the UDHR.[44] Moreover, Article 2(2) of the ICESCR uses the same language of the ICCPR, stating that "States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any

[41] O. M. Arnardóttir, A Future of Multidimensional Disadvantage Equality? in O.M Arnardottir and G. Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009), p. 47.
[42] Art. 2 of the Universal Declaration of Human Rights adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).
[43] See Judge Tanaka, *South West Africa*, Second Phase, (1966) ICJ, 293.
[44] L. Weiwei, *Equality and non-discrimination under international human rights law*, Norwegian Centre for Human Rights, Research Notes 03/2004.
See also Article 26 of the ICCCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

It is worth noting that these influential instruments for the international protection of human rights emphasise an open model of non-discrimination and a paradigm of formal equality. Open-ended clauses are not bound by a strict list of discrimination grounds.[45] The utilisation of the 'or other status' term means that the list of prohibited grounds of discrimination is not exhaustive, but on the contrary, is purely indicative and allows the inclusion of other grounds. The open approach does not clarify the legal standards and guidelines to assess an unequal treatment.[46] As a result, the lack of a clear demarcation between unlawful discriminations and justified treatments implies a 'creative' involvement of the courts, which are called upon to identify illegal conducts. This approach leaves a wide margin of discretion to the judges in interpreting the notion of reasonable justification and the set of prohibited treatments.[47] To the same extent, the leeway stemming from the open model of non-discrimination does not preclude the possibility to advance an unlimited amount of exceptions and defences for justifying differentiations. This model seems therefore highly vague and inappropriate to combat discrimination.

In addition, those international provisions concerning the prohibition of discrimination and the right to equality cannot be considered as independent norms because their application is subordinated to the violations of specific rights embodied in the treaty. This structure is also evident in the formulation of Article 14 of the ECHR which lays down that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour,

[45] D. Schiek, V. Chege, *European Union Non-Discrimination Law, Comparative perspectives on multidimensional equality law* (Routledge 2009), p. 55.
[46] T. Loenen, P. R. Rodrigues, *Non-Discrimination Law: Comparative Perspectives* (1999, Martinus Nijhoff Publishers).
[47] S. Fredman, *Discrimination Law* (2001, Clarendon Law Series).

language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[48]

2.1.2 *Is the formal approach adequate to combat discrimination?*

A significant weakness of the formal model is represented by the essential requirement of a suitable comparator for the analysis of equality. The choice of a comparator can often be challenging and problematic. Indeed, this requisite implies the exclusion of discriminatory grounds such as pregnancy and disabilities which lack adequate comparators. In this context, individuals who suffer systematic discriminations can only claim the same treatments as the privileged group despite having different and special needs.[49] For instance, the case of *Lisa Jacqueline Grant and South-West Trains Ltd* shows the main limits of the formal approach. [50] In this case, a travel concession was denied to the lesbian partner of a female employee. The CJEU stated that the refusal of the travel concessions to Ms Grant's partner did not amount to discrimination on the grounds of sex, as the rules concerning its grant applied equally to men and women. The CJEU explained that the employers' refusal to allow travel concessions to the person of the same sex with whom a worker has a stable relationship did not constitute discrimination as prohibited by Article 119 of the EC Treaty or Council Directive 75/117/EEC. The CJEU made the comparison with a hypothetical gay partner of a male employee and concluded that there was no discrimination. By contrast, whether the comparator had been a male employee of a female partner, the applicant would have benefited from the travel concession. This means that there is no violation of equality law where a contested measure lacks the necessary comparator.

[48] W. Vandenhole, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerp, Oxford: Intersentia, 2005).
[49] O. M. Arnardótt, *Equality and Non-Discrimination under the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2003). See also Cliona J.M Kimber, Equality or Self Determination, in Conor Gearty and Adam Tomkins (eds) *Understanding Human Rights, London* (Mansell Publishing, 1996).
[50] Case C-249/96 *Lisa Jacqueline Grant and South-West Trains Ltd* (1998) CJEU. See, C. Barnard, *EU Employment Law* (Oxford University Press, 2012), p. 291.

To conclude, it may be said that this approach does not tackle those systemic problems which permeate the legal system and does not provide normative indicators to identify illegal differentiations. The formal conception is also strictly related to the idea according to which States have only negative obligations and must abstain from introducing positive measures to guarantee equality. Thence, the sameness model emerging from the legal text of the first human rights treaties outlines 'empty' clauses of non-discriminations and equality. International instruments such as the UDHR, ICCPR and ICESCR symbolised an outstanding step forward for the protection of human rights, but they failed to recognise and accommodate the specific characteristics of vulnerable individuals. The crucial shift from the open model of formal equality to the substantive equality approach will now be examined.

2.2 The shift towards substantive equality: acknowledging the diversity

Substantive equality refers to the concept that individuals in different situations should be treated differently. This model includes two significant approaches: equality of results and equality of opportunity. Equality of results aims to reach equal outcomes through the adoption of specific measures in favour of marginalised groups of individuals. Differently, equality of opportunity seeks to guarantee an equal opportunity in order to gain access to a particular benefit, without assuring the achievement of the final result.[51]

The substantive model gradually assumed a leading role in international law and filled the legal vacuum deriving from the conception of formal equality. Indeed, the adoption of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) in 1965, along with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979 and the Convention on the Rights of the Child (CRC) in 1989, highlighted a fundamental and profound change in the approach towards equality and non-discrimination.

[51] Interights, *Non-Discrimination in International Law: A Handbook for Practitioners* (2011 Edition, London).

The new paradigm starts to take into account the concrete differences of disadvantaged persons and exceptionally establishes the conditions to accommodate specific biological and unalterable characteristics. The substantive model also refuses a passive role of the State and points out the necessity to introduce affirmative and relevant measures in the legal system for eliminating unequal treatments. This context privileges an asymmetrical approach that focuses on group characteristics and disadvantages. It sets out the requirements to assess the equality of a treatment and constitutes fertile ground to address indirect discriminations. In this way, the legal analysis aims to deal with those discriminations that continue to be perpetuated despite the application of formal equality's rules.

2.2.1 *Substantive equality jurisprudence*

The main proof of this change in human rights law is represented by the revolutionary interpretation of the Human Rights Committee concerning Article 26 of the ICCPR.[52] In the view of the Committee:

> "Article 26 does not merely duplicate the guarantee already provided for in Article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State Party, it must comply with the requirement of Article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided for in the Covenant".[53]

In its General Comment 18, the Committee underlined a renovated idea of equality and non-discrimination, which includes normative contents and positive duties upon State Parties. The emphasis on substantive equality also has its historical explanations. Human rights advocates and

[52] Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).
[53] HRC General Comment No 18, 'Non-Discrimination', 10.11.1989.

civil society organisations strongly advocated for substantive equality to tackle those laws, policies and practices bringing about systematic racial and gender discrimination. Moreover, this broader interpretation was promoted by several academics and scholars who criticised the emptiness of the formal model of equality.[54]

The departure from this model is also noticed in the jurisprudence of the ECtHR. For instance, in the *Schuler-Zgraggen* case, the Court held that denying a woman her invalidity pension, when it has been granted to men under the same circumstance, amounts to discrimination on ground of sex.[55] The Court adopted a strict scrutiny and stressed the necessity to verify the objectiveness and reasonableness of the unequal measures. According to the Court, "the advancement of the equality of the sexes is today a major goal in the Member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention".[56] This interpretation of the prohibition of discrimination on grounds of sex is in line with the substantive concept of equality that aims to concretely ensure the equal enjoyment of human rights for all groups of individuals.

An overview of the content of the substantive equality model will now be offered. The aim is to investigate to what extent the principles of equality and non-discrimination evolved at the international level.

[54] See P. Westen, The empty Idea of Equality (1982) 95 Harvard Law Review 537 and K. Greenawalt, How empty is the Idea of Equality (1983) 83 *Columbia Law Review* 1167.
[55] case of *Schuler-Zgraggen v. Switzerland* (Application no. 14518/89), ECHR, p. 64.
[56] K. Dzehtsiarou, T. Konstadinides, T. Lock, N. O'Meara, *Human Rights Law in Europe. The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge – 2014).

2.2.2 *Affirmative actions as special measures to achieve equality*

The legal shift towards equality of result is also reflected in several provisions of human rights treaties such as the International Convention on the Elimination of all forms of Racial Discrimination (CERD) and the Convention on the Elimination of Discrimination against Women (CEDAW).

They encompass a substantive and closed model for combating discriminations based on the identification of specific groups.[57] The closed model limits the grounds of discrimination and enshrines guidelines to identify objective justifications for certain treatments. Both Conventions use the same language and refer to the various types of discrimination which have the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The concept of *de facto* equality is the cornerstone of the CERD; the Preamble expressly refers to the goal to guarantee the enjoyment of certain rights without distinction of any kind and to prohibit discrimination between human beings on the grounds of race. The CERD acknowledges the possibility to provide distinctions for the purpose of launching affirmative actions and enhancing the social development of the various ethnic, racial and national groups. In this regard, Article 2(1) (c) of CERD underlines the duty of the States to take policy measures and to amend, rescind, or nullify any laws or regulations which have the effect of creating or perpetuating racial discrimination. This framework illustrates the legitimacy of introducing positive and affirmative actions in order to reach an effective level of equality within the society, but at the same time it identifies these measures as exceptions. Article 1(4) states that:

> "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed

[57] D. L. Shelton, *Prohibited Discrimination in International Law in The Diversity of International law: essay in honour of professor Kalliopi K. Koufa* (Aristotle Constantinides & NIkos Zaikos eds, 2009).

> racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved".

According to Theodor Meron, this provision marks an exception in respect to the definition of racial discrimination and excludes affirmative actions, because it allows the adoption of "special measures" unless they bring about "the maintenance of separate rights for different racial groups" or are "continued after the objectives for which they were taken have been achieved". As a result, there would be the risk to justify discriminatory rules and exclude action programmes.[58] Moreover, Article 2 (2) lays down that:

> "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

This provision guarantees wide margins of discretion to the States in order to adopt positive measures in favour of marginalised groups by providing that, 'when the circumstances so warrant', they shall take special and concrete measures to ensure the adequate protection of certain racial groups. In addition, the provision does not set out the guidelines to identify the vulnerable individuals and the extent to which the social, political and economic circumstances permit the issue of affirmative measures.

The same approach has also been embraced by Article 4 of the CEDAW:

> "Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in

[58] T. Meron, *Human Rights Law-Making in the United Nation. A critique of instruments and Processes* (1986, Oxford).

> no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."

In the context of the CEDAW, the concept of *de facto* equality has been confirmed in compliance with the new developments occurring in international human rights law. However, the CEDAW presents the same weaknesses found in CERD's framework and reveals a substantive model of equality in which affirmative action programmes continue to be deemed as special measures.

The approach emerging from these international instruments seems to reflect a paradigm that focuses on the biological and immutable differences of the person rather than the social barriers preventing individuals from the enjoyment of the rights.[59] The adoption of close-model discrimination clauses accelerated the process towards a broader and more effective protection of human rights, accommodating the specific diversity of disadvantaged groups of individuals.[60] Despite that, the active role of the State and the duty to provide affirmative actions for implementing the prohibition of discrimination still remain controversial issues, because they are considered as exceptions to the formal equality model. All the international instruments examined above focus on "substantive equality without forfeiting the merits of formal equality".[61] The final stage of the gradual development of the concept of equality under international human rights law will now be analysed.

2.3 Beyond differences: time to recognise social barriers and positive duties

The interpretation of human rights treaties by international courts started to reinforce the concept of equality and acknowledge those structural factors that jeopardise the concrete enjoyment of all human

[59] O.M. Arnardottir, A future of multidimensional Disadvantage Equality? in O.M Arnardottir and G. Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009), p. 52.
[60] S. Fredman and B. Goldblatt, *Gender Equality and Human Rights*, Discussion Paper UN Woman no. 4, July 2015.
[61] European Commission, Directorate- General for Employment, Social Affairs and Equal Opportunities, *Beyond Formal Equality* (Luxembourg, Office for Official Publications of the European Communities 2007).

rights. The substantive model of equality was applied to recognise the positive role of the State to tackle those social and external barriers that lead to discriminations.

For instance, the Committee on the Elimination of Discrimination against Women pointed out that special measures taken under Article 4, Paragraph 1, by States Parties should aim to accelerate the equal participation of women in the political, economic, social, cultural, civil or any other field. The Committee expressly considered "the application of these measures not as an exception to the norm of non-discrimination, but rather as an emphasis that temporary special measures are part of a necessary strategy by States Parties directed towards the achievement of *de facto* or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms".[62] In the same recommendation, the Committee put the emphasis on the social meaning of gender, which is an ideological and cultural construct. In this sense, gender refers to those constructed identities, attributes and roles for women that are imposed by society.

A similar approach has been adopted by the Committee on the Elimination of Racial Discrimination in the General Comment 8. The Committee stated that the identification of an individual, as a member of a particular racial or ethnic group, should be based upon self-identification by the individual concerned.[63] In line with this assumption, the Committee considered even the concept of descent as a form of social construction, strongly reaffirming that discrimination based on "descent" includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights.[64]

[62] Committee on the Elimination of Discriminations against Women, General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, thirtieth session, 2004.
[63] Committee on the Elimination of Racial Discrimination, General Recommendation 8, Membership of racial or ethnic groups based on self-identification (Thirty-eighth session, 1990), U.N. Doc. A/45/18 at 79 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 200 (2003).
[64] UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent), 1 November 2002.

The significant evolution concerning equality and non-discrimination at the international level emerges also in the draft of the UN Convention on the Rights of Child (CRC). To give an example, Article 2 of the CRC lays down that State Parties are the main negative and positive duty-holders without referring to the adoption of any special or temporary measures:[65]

> 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

The Convention promotes the introduction of specific protection measures to repair the unlawful consequences of unequal treatments and consolidate the concept of material equality in compliance with the new legal developments of international human rights law. [66] The application of the Convention's provision cannot be made dependent "upon budgetary resources" and the affirmative obligations are not regarded as exceptional actions.[67] In this general framework, the principle of non-discrimination gradually acquired an asymmetrical and substantive connotation. This model explicitly requires positive duties to remove social barriers that prevent the most vulnerable from the full enjoyment of their rights.

Currently, the peak of this process is mirrored by the adoption of the UN Convention on the Rights of Persons with Disabilities (CRPD). As it will be further explained below, the CRPD aims to redress

[65] S. Besson, The principle of non-discrimination in the Convention on the Right of the Child, (2005) 13 *International Journal of Children's Rights*, p. 449.
[66] *Ibid*, p. 452.
[67] *Ibid*, p. 453.

inequality and encourages real disability law reform, based on a conception of non-discrimination that goes beyond formal equality and involves a relevant category of substantive rights.[68]

2.4 The prohibition of discrimination under the CRPD

The CRPD not only represents the most recent human rights treaty introduced at international level, but also encompasses important legal developments concerning the model of equality. The Convention embraces an overarching concept of non-discrimination, which takes into account the specific differences of vulnerable groups and extends the legal protection in favour of persons with disabilities. To this end, the Convention's backdrop outlines the importance to provide affirmative action programmes and requires an active role of States Parties. In addition, it is worth noting that the CRPD Committee stated that the Convention is based on an "inclusive" concept of equality that embraces and extends the substantive model of equality. The new inclusive approach to equality implies:

> (a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity.[69]

Furthermore, according to Article 5.1, "States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law". This provision does not replicate a simple and empty concept of equality, but it triggers the issue of legal capacity and it is closely related to several provisions of the Convention.[70] The CRPD lays down that persons with disabilities shall enjoy legal capacity on an equal basis with others in all

[68] G. Quinn, the United Nations Convention on the rights of persons with disabilities: toward a new international politics of disability (2009-2010) 15 *Texas Journal on Civil Liberties & Civil Rights* 33.
[69] Committee on the Rights of Persons with Disabilities General comment No. 6 (2018) on equality and nondiscrimination (26 April 2018).
[70] A. Lawson, New era of False Dawn? (2006-2007) 34 *Syracuse Journal of International law & Commerce* 562.

aspect of life and have the right to recognition everywhere as persons before the law.[71] It follows that, persons with disabilities are deemed as bearers of rights and responsibilities,[72] in need of special protection in case they are unable to manage their affairs independently.[73] This provision concretely prohibits the legislator from adopting measures that set forth the legal incapacity of persons with disabilities and nullify their capacity to take independent decisions. In that regard, States Parties are called upon to guarantee the access of persons with disabilities to the support they may require in exercising their legal capacity.[74] Moreover, persons with disabilities are entitled to equal benefit of the law and consequently to have access to justice without encountering barriers.

The approach of the Convention not only departs from the asymmetrical model of equality, but it formalises the increasing need to ensure a clear, normative framework for the protection of an invisible group of individuals. From the CRPD a dynamic and holistic model of equality and non-discrimination emerges. The main evidences of this approach are constituted by a comprehensive definition of discrimination (Art. 2), the fundamental obligation to provide reasonable accommodation (Art. 2), the duty to launch affirmative action programs (Art. 27) and the goal to promote multidimensional equality (Arts. 6 – 7).[75] The prohibition of discrimination is regulated by Article 5(2) of the Convention which states that:

> "States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided. Specific measures which are necessary to accelerate or achieve de facto

[71] Art. 12 of the Convention on the Rights of Persons with Disabilities and its Optional Protocol (A/RES/61/106).
[72] A. Lawson, New era of False Dawn? 34 *Syracuse Journal of International law & Commerce*, p. 595.
[73] See CRPD, supra note, art. 12 (5).
[74] See CRPD, Art.12(3).
[75] O.M. Arnardottir, O.M. Arnardottir, A future of multidimensional Disadvantage Equality? in O.M Arnardottir and G. Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009), p. 60.

equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention".

This clear-cut provision expressly introduces disability as ground of discrimination under international human rights law. To the same extent, only the Convention on the Rights of Child and the Charter of Fundamental Rights of the European Union added disability to the potential grounds of discrimination.

The CRPD expressly prohibits all forms of discrimination, including denial of reasonable accommodation. A reference to indirect discrimination can also be found under Art. 2.4 of the Convention which mentions "any distinction, exclusion or restriction on the basis of disability which has the *purpose or effect* of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights". By doing so, it notably enlarges the guarantees in favour of disabled people, because it triggers the protection when a practice, rule, requirement or condition seems to be neutral on its face but impacts disproportionately upon particular groups.

This legal framework reveals an innovative agenda for assuring the highest standards of protection for persons with disabilities. The interpretation of prohibiting discrimination by the UN Committee on the Rights of Persons with Disabilities will now be analysed. It will be shown that the CRPD adopted a solid and comprehensive concept of substantive equality.

2.4.1 *The case of H.M. vs Sweden*

The Committee on the Rights of Persons with Disabilities seems to adhere to the logic and scope underlying the Convention. For instance, in a recent decision, the Committee held that Sweden failed to fulfil its obligations under Articles 5(1), 5(3), 19(b), 25 and 26, read alone and in conjunction with Articles 3 (b), (d) and (e), and 4(1) (d), of the Convention.[76] The claimant in the case involving

[76] Views of the Committee on the Rights of Persons with Disabilities under article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (7th session) Communication No. 3/201, *H.M. vs Sweden*, 6 December 2010 (initial submission).

Sweden had suffered from chronic connective tissue disorder, which led to hypermobility, severe luxations and sub-luxations, fragile and easily damaged blood vessels, weak muscles and severe chronic neuralgia. For this reason, she has not been able to walk or stand for eight years. The claimant was prevented from leaving her house or being transported to hospital or rehabilitation care due to the increased risk of injuries that may be incurred due to her impairment. The only type of rehabilitation that could stop its progress was hydrotherapy, which in the claimant's circumstances would have only been practicable in an indoor pool in her house.[77] To this end, the claimant applied for obtaining the permission for an extension of approximately 63 square meters to the house, but the request was rejected by the Örebro Local Housing Committee. The Administrative Court of Appeal also refused the claimant's application for planning permission. In this context, the applicant claimed that she had been discriminated against by the decisions of the State Party's administrative bodies and courts and her rights to equal opportunity for rehabilitation and improved health were violated. Furthermore, she argued that the refusals were based merely on public interest to preserve the development plan and that a specific exception to the development plan would not have jeopardised the surrounding area.[78] On the contrary, the justifications of the Swedish Government reflect the obsolete approach of formal quality. The State indeed emphasised that:

> "the relevant act in this case, the Planning and Building Act, is applied in the same way to all, whether they have disabilities or not. Nor are there any clauses in the Act that might lead indirectly to discrimination against persons with disabilities. The rejection of the application for a building permit in this case is in no way due to the author's disability, but rather consistent with practice that applies equally to all".[79]

By contrast, the Committee's stance confirms the significance of the substantive model of equality and non-discrimination. The Committee asserted that:

[77] *Ibid*, paragraph 2.2.
[78] *Ibid*, p. 3.1.
[79] *Ibid*, paragraph 4.12.

> "A law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different".

In addition, the Committee observed that the prohibition of discrimination requires the implementation of the duty to provide reasonable accommodations. In this regard, the access to a hydrotherapy pool at home would have been an essential and effective mean to improve the health needs of the claimant. Consequently, appropriate adjustments demanded a departure from the development plan in order to guarantee the building of a hydrotherapy pool.

With this background, the Committee affirmed that the refusal of the State Party to approve the applicant's request for a building permit constituted a failure to accommodate the specific circumstances of her case and her particular disability-related needs.[80] The Committee therefore considered the decisions of the Swedish authorities disproportionate, since they brought about a discriminatory effect that adversely affected the claimant, as a person with disability, access to the health care and rehabilitation required for her specific health condition. The Committee underlined that the State Party is under a specific obligation to redress the violation of the claimant's rights under the Convention, including by reconsidering her application for a building permit for a hydrotherapy pool.

The UN body stressed that the State Party has the legal obligation to prevent similar violations in the future by adopting normative rules that do not have the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of any right for persons with disabilities on an equal basis with others.[81]

[80] *Ibid*, p. 8.12.
[81] *Ibid*, paragraph 9.

2.4.2 *The substantive content of the non-discrimination requirement*

The decision of the Committee exhibits an outstanding interpretation of the prohibition of discrimination that requires the adoption of affirmative action by the State to advance the dignity of persons with disabilities. The equality paradigm of the CRPD crystallises the legal developments of international human rights law.

Article 5 of CRPD concerning equality and non-discrimination is a directly justiciable clause, which can be invoked by an individual to claim the violation of his or her rights. This provision represents an autonomous clause and its application is not strictly subordinated to the breach of other rights contained in the Convention. It enshrines specific obligations upon the State Party that has the positive duty to remedy the violation by introducing those necessary and concrete measures to implement disability rights. The State Party has also the general obligation to acknowledge the structural factors that prevent persons with disabilities from the enjoyment of their rights. The State Party has to ensure that its legislation and its application by domestic courts is consistent with the Convention's provisions.

It is noteworthy that the prohibition of discrimination triggers a dual obligation on the State Party which has the broader duty to "prevent similar violations in the future" and eliminate the systemic barriers affecting the national legal system. The principle of non-discrimination is not a mere and vague guideline underlying the CRPD, but it is the keystone of the legal protection of other fundamental provisions, such as the right to respect for home and family life, health, education, work and employment, adequate living standards and social protection, and participation in political and public life.[82]

[82] Articles 23, 24, 25, 27, 28 and 29 of the UN Convention on the rights of persons with disabilities expressly refer to the concept of non-discrimination.

In light of this context, it is important to point out that the duty to provide reasonable accommodation illustrates the main non-discrimination obligation. According to the definition of Article 2 of the Convention, reasonable accommodation means "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms". This provision has a "peculiar bridging role", because its application affects all rights and promotes the indivisibility of human rights.[83] Thus, the recognition of the duty to guarantee reasonable accommodations within the general prohibition of non-discrimination implies the imposition of positive obligations to identify social barriers and take actions to remove them.[84] The reasonable accommodation duty facilitates and accelerates the pragmatic application of the commitments embodied in the concept of substantive equality. This obligation entails the legal responsibility of different public and private actors including the State, employers, education and health care providers, providers of goods and services and private clubs.[85]

The only defence that allows a departure from the reasonable accommodation duty concerns the concept of "disproportionate or undue burden" that should introduce a notion of progressive realisation into the non-discrimination analysis.[86] This clause has not been explicitly defined by the Convention, but it seems to reflect the approach of the Americans with Disabilities Act (ADA), in accordance with an undue hardship is "an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation".[87] However, the Committee requires specific proofs from the State Parties

[83] A. Lawson, The UN convention on the rights of persons with disabilities and European disability law: A catalyst for cohesion? in O.M. Arnardottir & G. Quinn (Eds.) *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives*, (Leiden: Martinus Nijhoff, 2009), p. 103.
[84] J. E. Lord and R. Brown, 'The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities' in M.H. Rioux, L.A. Basser and M. Jones (eds), *Critical Perspectives on Human Rights and Disability* Policy (Martinus Nijhoff, The Hague, 2011).
[85] *Ibid*, at p. 279.
[86] Art. 2(4) of the UN Convention on the rights of persons with disabilities.
[87] Americans with Disabilities Act of 1990 (ADA), as amended by the ADA Amendments Act of 2008 (P.L. 110 325) Subchapter I – employment, Sec. 12111.

in order to demonstrate the existence of disproportionate or undue burdens and exclude consequently the application of the duty. For instance, in the case analysed above, the individual sought appropriate modifications and adjustments to allow the building of a hydrotherapy pool. The Committee noted that the State Party failed to explain the extent to which these adjustments would have required difficult expenses. It could therefore not conclude that the building of a hydrotherapy pool would have imposed a "disproportionate or undue burden" on the State Party.[88]

The CRPD establishes a clear objective to accommodate persons with disabilities on an individual basis and confers the main responsibilities to provide reasonable accommodations to the State Party, which has the duty to adopt appropriate policies and measures including affirmative action programmes and incentives.

To conclude, it may be said that the legal framework of the Convention is characterised by a dynamic and transformative conception of equality and non-discrimination, which accommodates the multi-layered disadvantages of person with disabilities. The CRPD not only abandons the formal approach towards equality but also extends the substantive guarantees in favour of a vulnerable group of persons. It aims to promote an active and effective role for the State Parties, which are under a positive duty to correct inequalities. The Convention stresses the increasing complexity of human rights law, which needs to be tailored to the specific experience of those persons who are prevented from the full enjoyment of their rights because of social and structural barriers. The intersectional dimension of the principle of equality embraced by the CRPD will now be examined.

2.5 Defining the concept of multiple and intersectional discrimination

The UN Convention embodies a concept of equality that takes into account both multiple and intersectional discrimination. Article 6 CRPD expressly mentions only 'multiple discrimination', but the CRPD Committee clarified that this provision, like article 7, must be regarded as "illustrative,

[88] Views of the Committee on the Rights of Persons with Disabilities, *H.M. vs Sweden*, 6 December 2010, p. 8.5.

rather than exhaustive, setting out obligations in respect of the two prominent examples of multiple and intersectional discrimination.[89] The Committee emphasised that women and girls with disabilities are among those groups of persons with disabilities who most often experience multiple and intersectional discrimination.[90]

The CRPD recognises the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinions, national, ethnic, indigenous or social origin, property, birth, age or other status.[91] The intersectional equality approach acknowledges the failure to classify a person on the basis of a single attribute, because various characteristics of an individual or any combination of them may constitute grounds of discrimination.[92] The adoption of this model symbolises a significant improvement in the context of non-discrimination law, since it fills the gap between law and reality. This gap originates from the lack of legal instruments that address discrimination based on multiple grounds. The interaction between multiple identities and attributes increases the possibilities to suffer from discriminations and accentuates the vulnerable conditions of disadvantaged groups.

The concept of multiple and intersectional discrimination comprises different types of situation. According to the CRPD Committee, multiple discrimination is a "situation where a person can experience discrimination on two or several grounds, in the sense that discrimination is compounded or aggravated".[93] For instance, compound discrimination occurs when discrimination is based on two or more grounds and each ground increases the possibilities to experience discrimination.[94] The famous UK case of *Perera v Civil Service* clearly illustrates this form of discrimination.[95] The

[89] Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 36.
[90] *Ibid*.
[91] Preamble The States Parties to the present Convention, paragraph (p).
[92] P. Uccellari, Multiple Discrimination: How Law can reflect Reality (2008) 1 *The Equality Rights Review* 24.
[93] Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 19.
[94] European Commission, *Tackling Multiple Discrimination – Practices, Policies and laws* (Luxembourg, 2007).
[95] *Perera v Civil Service Commission* (No 2) ([1983] ICR 428.

applicant, who was born in Sri Lanka, claimed that his application for a job in the Civil Service had been rejected on several occasions on grounds of his colour or national origin. The requirements for the job such as age, experience in the UK, nationality and knowledge of English language operated to exclude the claimant from successfully applying for the position. Thus, the lack of one factor did not prevent him from the possibility to obtain the job, but every discriminatory requirement contributed to decrease his chances to be selected for the position.

Intersectional discrimination is instead the category used to refer to a situation where two or more inseparable grounds interact with each other and constitute the basis of discrimination. For example, a woman with disabilities may experience discrimination for a job promotion, while at the same time non-disabled women or men with disabilities are not excluded from the career advancement.

2.5.1 *The unsatisfactory one-dimensional approach to discrimination*

The first UN human rights treaties, as well as EU law and many national regulations, are informed by the 'single-ground approach', which conceptualises discriminations as separate illegal acts based on a single-ground.[96]

This model presents evident limitations that jeopardise the effective protection of persons with a multidimensional identity. Indeed, if an individual has been discriminated against on different grounds, the person concerned can bring the complaint before the Court in relation to a sole ground, choosing the most favourable ground for obtaining a positive judgement. Otherwise, the claimant is obliged to claim alternated or cumulative grounds for introducing a judicial case.[97] The famous case of *Bahl v the Law Society* exemplifies the limits of the one-dimensional approach to equality. In this case, an Asian woman claimed to have been subject to discriminatory treatments on grounds of race

[96] European Union Agency for Fundamental Right (FRA), Inequalities and multiple discrimination in access to and quality of healthcare (Luxembourg, 2013).
[97] P. Uccellari, Multiple Discrimination: How Law can reflect Reality, 1 *The Equality Rights Review* 24, p. 26. See also *Bahl v The Law Society & Anor* [2004] EWCA Civ 1070 (30 July 2004).

and gender.[98] The Employment Appeal Tribunal and the Court of Appeal ruled that it was not possible to consider both grounds in the same case, although the claimant experienced them as inevitably interconnected. It is worth noting that this legal model does not take into account the real discriminatory experience of the individual and the impact of the intersection between different characteristics.

As a result, the single-ground approach excludes situations from the protection of equality legislation where the claimant cannot demonstrate the existence of a comparator who has suffered the same treatment. For instance, a woman with disabilities, victim of intersectional discrimination, may not successfully bring a judicial case because of the presence of non-disabled women comparators in a claim related to gender. At the same time, in a separate complaint related to disability, the claimant would lose the lawsuit because of the existence of men with disabilities comparators. This flaw characterises several national legal systems that do not provide effective remedies to address the multiple nature of the discrimination.

The single-ground approach has been embodied in the Convention on the Elimination of all Forms of Racial Discrimination which prohibits race discrimination and does not allow for individual complaints based on both sex and racial grounds. However, the weaknesses of this approach have been recognised by the monitoring Committee of the CERD that acknowledged the importance to condemn certain forms of racial discrimination towards women, specifically because of their gender.[99]

This development in the interpretation of the prohibition of discrimination has also been hailed by the General Recommendation 18 of the Committee on the Elimination of All Forms of Discrimination against Women. The Committee addressed the issue of discrimination against women, in particular

[98] *Bahl v The Law Society and others* [2004] IRLR 799 CA.
[99] Committee on the Elimination of Racial Discrimination, General Recommendation No. 25: Gender related dimensions of racial discrimination: 20/03/2000. Gen. Rec. No. 25. (General Comments).

those from the most disadvantaged sectors of society, such as women of African descent.[100] The Committee noted that the claimer has been subject to multiple discrimination not only on ground of sex, but also because of her status as a woman of African descent and her socio-economic background.[101]

The last step of the legal evolution concerning the concept of multidimensional equality was the adoption of the General Comment No. 20 of the Committee on Economic and Social and Cultural Rights (CESCR). According to the Comment:

> "Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying".[102]

The Committee on CESCR pointed out the necessity to tackle intersectional and multiple discrimination. The jurisprudence of the international human rights bodies exhibited an increasing interest towards multidimensional equality. In doing so, multiple and intersectional discrimination have been gradually recognised under international law. This changing attitude mirrors the complexity of the contents of human rights law and the multifaceted aspects informing the notion of substantive equality.

2.5.2 *Intersectional equality under the CRPD: women and children with disabilities*

The Convention on the Rights of Persons with Disabilities could be said to be the first human rights treaty that expressly provides a comprehensive framework for combating multiple and intersectional discrimination. Article 6 states that States Parties recognise that women and girls with disabilities are

[100] Committee on the Elimination of Discrimination against Women, General Recommendation 18, Disabled women (Tenth session, 1991), U.N. Doc. A/46/38 at 3 (1993).
[101] European Union agency for fundamental right (FRA), *Inequalities and multiple discrimination in access to and quality of healthcare* (Luxembourg, 2013), p. 23.
[102] Committee on economic, social and cultural rights, forty-second session Geneva, 4-22 may 2009 agenda item 3 general comment No. 20 Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights).

subject to multiple discrimination, and in this regard, shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms. In addition, States Parties are called on to take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the Convention.[103] The CRPD legitimates the idea according to which the combination of two inseparable grounds can bring about discriminations, taking into account the specific condition of women and children with disabilities.[104] These groups of individuals are extremely susceptible to experience dual forms of discrimination within the family and society.[105] It is noteworthy to outline that unequal treatments due to gender are widespread in every region of the world and include unlawful practices such as female genital mutilation, child marriage, the practice to compel women to become prostitutes and the ethnic tradition to deprive women of the freedom of choice in marriage. Consequently, persons with disabilities are more vulnerable than women and children without disabilities.

One may for instance refer to data provided by the United Nations Population Fund (UNFPA), which shows that women and children with disabilities are more likely to be subject to sexual abuse, physical violence and discriminatory treatments.[106] The Factsheet on Persons with Disabilities also reveals that in Orissa, India, 25 percent of women with intellectual disabilities had been raped and six percent of women with disabilities had been forcibly sterilised.[107] Moreover, according to a UNDP study, the global literacy rate for adults with disabilities is as low as three percent, while it decreases to one percent for women with disabilities.[108] Data concerning children with disabilities shows that 90

[103] Art. 6 of the Convention on the Rights of Persons with Disabilities.
[104] A.C. Hendriks, 'UN Convention on the Rights of Persons with Disabilities', (2007) 14 *European Journal of Health Law* 273.
[105] Secretariat for the Convention on the Rights of Persons with Disabilities of the Department of Economic and Social Affairs; United Nations Population Fund; Wellesley Centres for Women, Disability Rights, Gender, and Development, A resource tool for Action (2008).
[106] *Ibid*, Module 2-9.
[107] United Nations Enable, Factsheet on Persons with Disabilities (2011).
[108] Human Development Report 1998 Published for the United Nations Development Programme (UNDP) (Oxford University Press 1998).

percent of children with disabilities in developing countries are prevented from attending school.[109] Women with disabilities are more disadvantaged in comparison with men with disabilities as regards to access to education, services, employment and social assistance.[110] Thereby, women with disabilities are less likely to be employed and have lower wages in respect to men.

The intimate combination of both gender and disability status represents a "double jeopardy" and increases the possibilities to face discrimination in the workplace.[111] The intersectional approach to equality acknowledged by the Convention marks a remarkable improvement for the protection of human rights at the international level, because it contemplates the multi-layered experience of discrimination. The prohibition of multiple and intersectional discrimination contributes to reinforce a substantive model of equality that aims to break the cycle of disadvantages and remove social obstacles.[112] By contrast, the one-dimensional approach perpetuates the limits of the formal model of equality which does not accommodate those disadvantages of the individual's identity.

The concept of disability will now be examined and it will be briefly shown how to interpret the model of disability endorsed by the CRPD.

3. The CRPD's model of disability: from a social construct towards a human rights approach

The CRPD introduces an ideal framework for tackling discriminations, and favours the true societal adaptation to the needs of persons with disabilities. The substantive equality paradigm is supported and reinforced by a social understanding of disability that emphasises the importance of eliminating external barriers that jeopardise the full enjoyment of human rights for persons with disabilities. The CRPD does not provide a strict legal definition of disability, but points out "a soft threshold definition

[109] Data are taken form the FA Flagship Initiatives of UNESCO, The Right to Education for Persons with Disabilities: Towards Inclusion.
[110] T. Emmett & E. Alant, Women and disability: exploring the interface of multiple disadvantage (2006), 23:4 *Development Southern Africa* 445.
[111] L. Jans, & S. Stoppard, *Chartbook on women and disability in the United States. An InfoUse Report* (Washington 1999, DC: US Department of Education, National Institute on Disability and Rehabilitation Research).
[112] S. Fredman, *Discrimination Law* (Oxford University Press, 2011).

in the form of guidance which is open-ended and inclusive".[113] The CRPD's preamble recognises that disability "is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers". Moreover, Art. 1 of the CRPD distinctly sets out a concept of disability that includes those individuals "who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

The CRPD enshrines a social construct of disability replacing the traditional 'medical view' which merely places the impairment within the individual.[114] The CRPD tries to overcome the limits of the medical model of disability, which locates the failure to meet the norm with the individual and regards disability as an impairment that needs to be cured. The medical approach recognises disability as the "exclusive realm of helping and medical disciplines"[115] and prevents the application of the equality principle to persons with disabilities.[116] In doing so, this model reduces persons with disabilities to their impairments and does not acknowledge them as rights holders. By contrast, the CRPD crystallises the concept according to which society contributes to disable persons with impairments.[117]

The social approach to disability has often been criticised because it does not consider the extent to which individual deficiencies concretely affect persons with disabilities.[118] In this regard, an accessible and inclusive society would not equalise persons with disabilities with non-disabled

[113] G. de Burca, The EU in the negotiation of the UN Disabilty Convention (2010) 35 *European Law Review* 174.
[114] See for instance F. Hasler, Developments in the disabled people's movement in J. Swain et al. (Eds.), *Disabling barriers, enabling environments.* (London: Sage, 1993); M. Oliver, *Understanding disability: from theory to practice* (Basingstoke: Macmillan, 1996); S.Wendell,. *The Rejected Body: Feminist Philosophical Reflections on Disability*. (New York: Routledge, 1996).
[115] T. Degener, Disability in a Human Rights Context (2016) 5 *Laws* 35.
[116] Committee on the Rights of Persons with Disabilities, General comment No. 6 on equality and non-discrimination (26 April 2018).
[117] P. Harpur, Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities, (2012) 27 *Disability & Society* 1.
[118] T. Shakespeare and N. Watson, The social model of disability: an outdated ideology? (2002) 2 *'Research in Social Science and Disability*' 9.

individuals.[119] However, it is worth noting that the CPRD adopts a flexible and *evolving* concept of disability which takes into account the interplay between the individual impairment and the external barriers. By doing so, it aims to overcome the main limitations of a rigid model of disability and provides significant leeway to adapt the concept of disability to different socio-contextual circumstances.

It may be argued that the social model provides fertile ground to build and develop a new "human rights" approach to disability in accordance with the individual impairment must be valued as part of human variation. The recent General Comment No. 6 on equality and non-discrimination adopted by the CRPD Committee expressly states that the:

> "Human rights model of disability recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights. It acknowledges that disability is one of several layers of identity. Hence, disability laws and policies must take the diversity of persons with disabilities into account. It also recognizes that human rights are interdependent, interrelated and indivisible."[120]

The reasoning of the CRPD Committee embraces the new developments in academic literature concerning the human rights model of disability, which focuses on the inherent dignity of the human being and the inclusion of persons with disabilities in all decisions affecting their life. The social or contextual concept of disability embodied in the CPRD does not ignore the effects that impairments might have upon individuals, but it seeks to promote a paradigm shift in the understanding of disability by focusing on those final results caused by the impairment in a given social context.

It may be said that the CPRD reshapes the social model of disability and recognises impairments as part of human diversity.[121] For instance, Art. 3 of the CRPD explicitly lays down that "respect for difference and acceptance of persons with disabilities" must be considered as part of human diversity

[119] T. Shakespeare, *Disability Rights and Wrongs* (Abingdon, 2006), p. 51.
[120] Committee on the Rights of Persons with Disabilities, General comment No. 6 on equality and non-discrimination (26 April 2018).
[121] See for instance T. Degener, Disability in a Human Rights Context (2016) 5 *Laws* 35; P. Blanck, E. Flynn, *Routledge Handbook of Disability Law and Human Rights* (Routlege 2017).

and humanity. By doing so, it does not embrace "a radical social constructionist view of disability, in which impairment has no underlying reality",[122] but rightfully rejects the idea of persons with disabilities as objects of charity, medical treatment and social assistance. The CRPD acknowledges that persons with disabilities are subjects of rights and active members of society. To this end, it requires the removal of those structural and external obstacles that obstruct the full enjoyment of their fundamental rights. The objective to ensure substantive equality is assisted by a social construction of disability that encourages the alteration of able-bodied norms and the adoption of reasonable adjustments to accommodate persons with disabilities. The CPRD provides the tools to drive a change in the judicial interpretation of the prohibition of discrimination on grounds of disability by expanding the analysis beyond those individual limitations caused by a medical condition. The social model of disability will be used as the basis of the analysis of this doctoral thesis, as the General Comment that raised the human rights approach was adopted well after this work commenced.

The next section will briefly examine the extent to which the CRPD integrates civil and political rights with socio-economic rights to enhance the protection of persons with disabilities. It will be shown that a new ambitious and proactive model of rights is emerging under international human rights law that goes beyond the simplistic dichotomy between socio-economic rights and civil and political rights.

4. Reconceptualising the human rights dichotomy

International human rights law has traditionally been characterised by a distinction between civil and political rights (CP) on the one side and economic, social and cultural rights (ESC) on the other one.[123] Civil and political rights are generally regarded as rights of first generation, while socio-economic

[122] R. Kayess and P. French, Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities (2008) 8 *Human Rights Law Review* 1.
[123] See generally L. Sohn, The New International Law: Protection of the Rights of Individuals rather than States (1982). 32 *American University Law Review* 1. See also P. Alston, Conjuring up New Human Rights: A Proposal for Quality Control, 78 *American Journal of International Law* 607 (1984).

rights as second generation rights.[124] The third generation includes the right to development, the right to self-determination, minority rights and the right to a healthy environment. After the adoption of the 1948 Universal and inter-American declarations of human rights which lay down a comprehensive catalogue of rights, the drafting of subsequent global treaties has reflected the classic division of rights into two categories. The content of the UDHR was codified into the two 1966 sister covenants: the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).[125]

In this context, the traditional paradigm tends to distinguish between rights on the basis of their correspondent duties. Duties of restraints are associated with "freedom-protecting civil and political rights", whereas positive duties are related to "equality-promoting socio-economic rights".[126] As a result, positive duties are immediately applicable; by contrast duties of restraint require to be realised progressively.[127] Moreover, civil and political rights are considered as justiciable and inexpensive, while social, economic and cultural rights as non-justiciable and costly. For instance, social rights have been traditionally viewed as not imbued of legal contents and inherently not-justiciable on the grounds that their implementation was a political matter, not a matter of law.[128]

Nowadays, this dichotomy seems to be highly contested as the most recent international treaties adhere to a holistic and indivisible notion of human rights. For example, the EU Charter of Fundamental Rights (EUCFR) protects both civil and political and socio-economic rights. It also has

[124] T. Meron, On a hierarchy of international human rights (1986) 80 American Journal of International Law 1.
[125] L. Richardson, Economic, Social and Cultural Rights (and Beyond) in the UN Human Rights Council, (2015) 15 *Human Rights Law Review* 409.
The International Covenant on Civil and Political Rights was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 23 March 1976.
The International Covenant on Economic, Social and Cultural Rights, was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 3 January 1976.
[126] S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008).
[127] *Ibid*, p.69. See also art. 2.1 of ICCPR and art.2.1 of ICESCR.
[128] See Egbert W. Vierdag, The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1978) 9 *Netherlands Yearbook of International Law* 69.
L. Pech, *Socio-economic rights jurisprudence - emerging trends in comparative and international law* (Malcolm Langford, ed., Cambridge University Press, 2007).

been made legally binding by the Lisbon Treaty.[129] The Charter does not replicate traditional human rights documents, but aims to integrate civil and political rights with socio-economic rights, imposing positive and proactive duties on the State.[130] According to de Búrca, the Charter does not distinguish between justiciability and non-justiciability. It is likely to "function as a source of values and norms [...] to influence the interpretation of EU legislative and other measures and to feed into policy-making and into EU activities more generally".[131]

In addition, the Declaration adopted during the Vienna World Conference on Human Rights explicitly emphasises that human rights are universal, indivisible and interdependent and interrelated.[132] The Vienna Declaration and Programme of Action underlines the obligation of the international community to treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. To this end, the duty of States, regardless of their political, economic and cultural systems, is to promote and protect all human rights and fundamental freedoms.[133] Despite that, the international protection of socio-economic rights continues to encounter legal difficulties and political obstacles as it demands positive and costly actions by States.[134] Differently, civil and political rights do not always trigger a positive duty upon the State to provide all the necessary measures to guarantee the implementation of the right. This backdrop demonstrates that the

[129] See S. Peers, T- Hervey, J. Kenner, A. Ward, *The EU Charter of Fundamental Rights A Commentary* (Oxford, Hart Publishing 2009).
[130] S. Fredman, Transformation or Dilution: Fundamental Rights in the EU Social Space (2006) 12 *European Law Journal 141*.
[131] G. de Burca, 'Fundamental Rights and Citizenship', in B. de Witte (ed) *Ten Reflections on the Constitutional Treaty for Europe* (European University Institute, 2003), p. 24.
[132] On 25 June 1993, representatives of 171 States adopted by consensus the Vienna Declaration and Programme of Action of the World Conference on Human Rights presenting to the international community a common plan for the strengthening of human rights work around the world.
[133] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993.
[134] Statement to the Vienna Conference by the UN Committee on Economic, Social and Cultural Rights, 1993; "The shocking reality... is that states and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action."

demarcation between civil and political rights and socio-economic rights is still an interesting issue in the discourse of human rights law.[135]

4.1 Disabilities rights as universal and indivisible: do civil and political rights demand economic resources?

The CRPD overturns the stark dichotomy between civil and political rights and socio-economic rights. The Preamble specifies that a comprehensive and integral international convention is necessary to promote and protect the rights and dignity of persons with disabilities. The emergence of a new proactive model of rights seems crucial to redressing the profound social disadvantage of persons with disabilities and promoting their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries. In that regard, the States Parties reaffirm the "universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination".[136] This means that all rights require positive actions and affirmative programmes, also those civil and political rights which are merely associated to duties of restraints.

An overview of the most recent decisions of the Committee will now be offered. It will be demonstrated that the implementation of civil and political rights related to persons with disabilities implies a proactive role of the State.

In order to guarantee the participation in political and public life of persons with disabilities, the Committee on the Rights of Persons with Disabilities pointed out the importance to enhance the active participation of persons with disabilities in politics through affirmative action and ensure the

[135] S. Fredman, Human rights transformed: Positive duties and positive rights, Legal Research Paper Series, Paper No 38/2006.
[136] *Ibid*, recital c.

accessibility of all voting stations.[137] It took note of the difficult situation of persons with hearing impairments in accessing information due to lack of official recognition of the significance of sign language by Hong Kong, China. The Committee highlighted those fundamental obligations stemming from the freedom of expression and opinion, and access to information. The Committee therefore urged Hong Kong, China, to enhance the training for and the services provided by sign language interpreters.[138] In this context, the proactive role of the State is central for assuring the effective enjoyment of civil and political rights in favour of persons with disabilities.

Even in relation to the freedom from exploitation, violence, and abuse (Art. 16), the Committee did not only recommend the State from abstaining to carry out those violations, but it was particularly concerned about the positive duties to investigate the incidents and prosecute the perpetrators. Lastly, the Committee recognised the difficult conditions of women and girls with intellectual disabilities who may be subjected to sexual violence. Thus, it urged the State to guarantee sex education to children and adolescents with intellectual disabilities and appropriate trainings for the law enforcement personnel on handling violence against women and girls with disabilities.[139] As a consequence, it may be argued that the full realisation of civil and political rights depends on the economic resources invested by the State Parties. All rights have budgetary implications and rights of persons with disabilities require supplementary funds.[140]

To give another example, in the observations on the initial report of Argentina, the Committee held that the Argentinian legal framework positively takes into account the principle of inclusive education for persons with disabilities. However, it concluded that the implementation of the right to education is limited, in practice, "by a failure to tailor programmes and curricula to the needs of pupils with

[137] Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of China, adopted by the Committee at its eighth session (17–28 September 2012).
[138] *Ibid*, p. 71-72.
[139] *Ibid*, p. 66.
[140] I. E. Koch, From invisibility to indivisibility: the international Convention on the rights of persons with disabilities in O. Arnardottir & G. Quinn (Eds.) *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Leiden: Martinus Nijhoff), p. 72.

disabilities and by the prevalence of all sorts of barriers that prevent persons with disabilities from accessing the educational system without discrimination and on an equal footing with other students".[141] Consequently, the Committee recommended the development of a comprehensive State education policy that assures the right to inclusive education and allocates sufficient budgetary resources. This example is one of many demonstrating the progressive emergence of a new substantive and demanding approach towards disability rights, in compliance with the commitments of the CRPD. This new legal approach is based on the indivisibilities of duties and a uniform level of protection that facilitates the interaction between the two different sets of rights.[142] The next sub-section will investigate to what extent socio-economic rights, as resources-demanding rights, are justiciable before the CRPD Committee.

4.2 Disability rights as (quasi)-justiciable rights

The traditional theory separates civil and political rights from socio-economic rights also on the ground of justiciability, excluding the latter from the judicial arena. A right is generally considered "justiciable" when it can be examined by a judge in a concrete set of circumstances and when this examination can imply a further determination of this right's significance.[143] Civil and political rights were seen as precise enough to be applied, while socio-economic provisions were thought as vague and unenforceable. Positive duties associated to socio-economic rights were regarded to go beyond the institutional legitimacy of the courts, because entailing a significant level of resource commitments.[144] They were deemed as excessively costly, requiring welfare measures by the State and therefore falling under the exclusive competence of the political decision-makers. However, the CRPD has removed these conceptual boundaries between civil and political rights and socio-

[141] Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Argentina as approved by the Committee at its eighth session, (17–28 September 2012), p. 38.
[142] See also S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008), p. 67.
[143] K. Arambulo, *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights-Theoretical and procedural aspects* (Intersentia- Hart, Antwerpen/Groningen/Oxford, 1999), p. 55.
[144] See S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008).

economic rights that inform the traditional human rights discourse. Currently, both categories of rights are justiciable before the CRPD Committee.

The Committee represents a quasi-justiciable body and has the competence to receive and consider communications from, or on behalf of, individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.[145] The treaty-body has the competence to request that the State Party adopts interim measures as needed to avoid possible irreparable damage to the victim (Art. 4). The Committee may also issue non-binding and quasi-judicial recommendations for eliminating violations and redressing any damage caused by them (Art 5).[146] The UN body may also promote an inquiry in case it receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention (Art 6). Interestingly, the decisions of the Committee explicitly reveal a resource-demanding approach that urges State Parties to provide welfare measures for implementing all disability rights. This approach entails the justiciability of those socio-economic rights that have usually been associated with non-justiciable duties. The next sub-section will analyse a remarkable decision of the CRPD Committee which demonstrates the justiciability of all human rights.

4.2.1 ***The right to control one's own financial affairs***

In a recent communication, the Committee has recognised the right to control one's own financial affairs in favour of persons with visual impairments.[147] The case originated from the compliant of two Hungarian citizens, who concluded a contract with the OTP Bank Zrt. credit institution (OTP) in order to use banking cards. Despite that, the applicants were prevented to use the automatic teller machines (ATMs) because of the lack of assistance. Indeed, the ATM keyboards were not marked

[145] Art. 1 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (A/RES/61/106).
[146] N. Hart; M. Crock, R. McCallum and B. Saul, Making every life count: Ensuring equality and protection for persons with disabilities in armed conflicts (2014) 40 *Monash University Law Review* 148.
[147] Committee on the Rights of Persons with Disabilities, Communication No. 1/2010, Views adopted by the Committee at its ninth session (15-19 April 2013).

with Braille, nor did the ATMs make audible instructions and voice assistance for banking card operations available. The applicants claimed that they were unable to use the services provided by the ATMs at the same level as non-disabled clients, although they paid annual fees for banking card services and transactions equal to the fees paid by other clients.[148]

In light of this factual background, they claimed to be victim of direct discrimination in accessing the financial services provided by the ATMs compared to persons without disability. By contrast, the State Party underlined that the accessibility of banking services is a crucial issue which can only be achieved gradually, due to the related costs and technical viability, through the installation of new ATMs providing physical and info-communication accessibility. Therefore, the State Secretary recommended OPT to adopt the appropriate machines in the future. At the same time, it found the compatibility of the Supreme Court's decision with the State Party's law, in accordance with OTP, is exempted from the obligation to assure equal treatment under the Equal Treatment Act because the applicants accepted the contractual terms for private current account services, including the facility of limited use.[149]

The Committee noticed that the State Party did not acknowledge the duty upon private entities to provide accessibility of information, communications and other services for persons with visual impairments on an equal basis. On contrary, the Committee emphasised that under Article 4, Paragraph 1(e), of the Convention, States Parties have the general obligation "to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private

[148] *Ibid*, 2.1.

[149] *Ibid*, p. 2.16: "The Supreme Court delivered its decision on 4 February 2009, rejecting both the request for judicial review by the authors and the request for judicial review by OTP. The Supreme Court shared the opinion of the Metropolitan Court of Appeal that the ATMs designed for sighted persons put blind or visually impaired persons in a disadvantageous situation, even though it seemed that they may use the ATMs under the same conditions as everybody else. The disadvantageous situation is induced by the fact that there is no Braille on the ATMs, and the owner of the banking card does not have voice assistance support when using the machines. The Supreme Court also agreed with the arguments of the second instance court with regard to OTP's exemption from the obligation to provide for equal treatment under the Equal Treatment Act. Furthermore, the Supreme Court asserted that the parties concluded a contract for private current account services, the content of which may be freely established by the parties. The Court stated that the authors took note of the contractual terms, including the facility of limited use, and by signing the contract, they agreed to their disadvantaged situation through implied conduct".

enterprise". To this end, States Parties are required pursuant to Article 9 of the Convention "to take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to, inter alia, information, communications and other services, including electronic services, by identifying and eliminating obstacles and barriers to accessibility". In particular, the UN body recalled the specific duty of the State to guarantee that private actors provide accessible services to persons with disabilities. States Parties should take appropriate measures to develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public (Art. 9, para. 2(a), of the Convention), and ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities (Art. 9, para. 2(b))[150]. As a consequence, the Committee held that Hungary failed to fulfil the obligations embodied in Article 9, Paragraph 2(b), of the Convention.

4.2.2 *Debunking the argument of "the progressive realisation of socio-economic rights"*

This case exhibits interesting and innovative legal aspects in relation to the protection of socio-economic rights under international human rights law and the issue of accessibility. Indeed, the State Party sought to advance the common justification of the "progressive realization of economic, social and cultural rights" in order to deal with the accessibility of the ATMs and other banking services. In that regard, it argued that "steps are to be taken to change the accessibility of the ATMs and other banking services, including accessibility not only for the blind, but also for persons with other disabilities" and "the above target can only be achieved gradually".[151]

The notion of progressive realisation is often used by governments as an 'escape hatch' with the purpose to postpone or dodge the fulfilment of their human rights obligations.[152] According to this

[150] *Ibid*, p. 9.5.
[151] *Ibid*, p 4.3.
[152] S. Leckie, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 81.

argument, the lack of available resources constitutes a legitimate reason to avoid the immediate realisation of socio-economic rights. This justification introduces flexible elements in the application of human rights law and brings about a sort of uncertainty in relation to the contents and extent of the legal obligations imposed by the UN treaties.[153] However, the CRPD sets out that with regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realisation of these rights.[154]

Despite the introduction of this controversial clause in the Convention's framework, the Committee did not hesitate to affirm the importance of an effective and successful implementation of disability rights at national level. The Committee was not persuaded by the Hungarian Government's assumption to gradually achieve accessibility due to costs involved. On contrary, the Committee observed that the measures adopted by OTP and other financial institutions have not ensured the accessibility of banking card services for the applicants or other persons in a similar situation. The final decision clearly shows that the main objective of the Convention is to bring about a real change in the society. The Committee required the adoption of "a legislative framework with *concrete, enforceable and time-bound benchmarks* for monitoring and assessing the gradual modification and adjustment by private financial institutions of previously inaccessible banking services provided by them into accessible ones".[155]

It may be said that the Committee plays a key role in monitoring the application of the Convention's provisions within the national systems and increasing the awareness of persons with disabilities with regard to their own rights. The aim of the Convention is to improve the legal protection of persons with disabilities. To this end, it promotes the justiciability and implementation of those socio-

[153] E. Felne, Closing the 'Escape Hatch': A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights (2009) 1 *Journal of Human Rights Practice* 402.
[154] Art. 4(2) of the UN Convention on the rights of persons with disabilities.
[155] Committee on the Rights of Persons with Disabilities, Communication No. 1/2010, Views adopted by the Committee at its ninth session (15-19 April 2013), p. 10.1(a).

economic rights (such as the right to control one's own financial affairs) which can concretely enhance the protection of persons with disabilities, regardless of the amount of economic resources needed by States Parties.

4.2.3 *The peculiar case of accessibility: a bridge between civil-political and socio-economic rights?*

The above case confirms that the CRPD's goal to ensure the justiciability of all human rights, in particular of those socio-economic rights that are often excluded from the political agenda of the State Parties. Notably, the issue of accessibility represents a critical point for the concrete empowerment of persons with disability. The concept of accessibility implies a profound adaptation of the society, both in its public and in its private dimensions, to the specific needs of person with disabilities in order to enable all people to fully participate in all aspect of life.[156] Accessibility refers not only to the physical environment, but it also affects the participation of individuals in the political and economic sector.[157] It should be viewed as an essential instrument to pursue equality and non-discrimination. Indeed, according to Article 9 of the CRPD, in order to enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties have the obligations to introduce all appropriate measures to ensure that persons with disabilities have access to transportation, information and communications and other facilities and services open or provided to the public. Accessibility is a vital pre-condition for the effective and equal enjoyment of different civil, political, economic, social and cultural rights by persons with disabilities.[158] The implementation of this provision is therefore crucial to ensure the full realisation of the rights of persons with disabilities.

[156] Office of the High Commissioner for Human Rights, Monitoring the Convention on the Rights of Persons with Disabilities Guidance for human rights monitors Professional training series No. 17, New York and Geneva, 2010.
[157] R. Lang, The United Nations Convention on the right and dignities for persons with disability: A panacea for ending disability discrimination? La Convention des Nations Unies sur les droits des personnes handicapées: une solution pour mettre fin à la discrimination contre le handicap? (2009) 3 *ALTER European Journal of Disability Research* 266.
[158] Committee on the Rights of Persons with Disabilities, General comment on Article 9: Accessibility (Eleventh session 30 March –11 April 2014).

An overview of the emergence of civil society groups in the global governance will now be offered. The aim is to identify to what extent NGOs can inform and improve the decision-making process at international level. The role of disability advocacy organisations in the CRPD's negotiations and drafting will be analysed. In particular, it will show that the CRPD encompasses a model of participatory democracy that requires the involvement of all relevant stakeholders in the entire policy chain, from conception to implementation, on the basis of an inclusive approach.

5. The rising of civil society in global governance

The relevant participation of NGOs in the CRPD's negotiations is a positive and beneficial aspect of the current relationship between society and international politics. Civil society can contribute to improve the quality of the decision-making process of international bodies and the functioning of global governance. According to Antonio Gramsci, civil society is "a set of institutions through which society is organised and represented itself autonomously from the state".[159] Non-governmental organisations represent a fundamental and crucial segment of international civil society, which cannot be identified with the State or the market.[160] Indeed, the concept of "civil society" encompasses a broad range of social actors, such as voluntary associations, human rights promoters, educational institutions, environmental movements, organisations for development cooperation, academic forums and think tanks. On the other hand, global governance entails those laws, policies and institutions that define trans-border relations between states, citizens, intergovernmental and non-governmental organisations, and the market.[161]

The realist idea according to which international relations are shaped exclusively by global power arrangements and State interests is outdated, because it does not consider the emerging role of

[159] A. Gramsci, *Quaderni dal Carcere*, 1929-1935, (Roma, Istituto della Enciclopedia Italiana 2017).
[160] H. Cullen and K. Morrow, International civil society in international law: the growth of NGO participation (2001) 1 *Non-State Actors & International law* 7.
[161] See T. G. Weiss, R. Thakur and J. G. Ruggie, *Global Governance and the UN: An Unfinished Journey* (Indiana University Press, 2010).

international civil society.[162] Global relations and contemporary governance are characterised by the interaction of transnational, regional and local actors that permanently operate in the international realm.[163] In this context, the multi-layered identity of individuals is not adequately represented and protected by the current interests of national governments. For this reason, the development of higher standards of protection for human rights at international level is the outcome of the decisive action of those multiple groups belonging to civil society.

The United Nations' framework has often been criticised because its institutional structure marginalises the independent role of NGOs and individuals.[164] The UN Charter merely recognises the consultative role of non-governmental organisations in the formal process of deliberation of the Economic and Social Council (ECOSOC). Article 71 points out that "the Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organisations and, where appropriate, with national organisations after consultation with the Member of the United Nations concerned". [165] The UN has opened its door to NGOs, but their participation is limited to the specific competences of the ECOSOC.[166]

Despite this State-centric approach, civil society has gradually carried out a "quiet revolution" in the UN system.[167] For instance, it is noteworthy to stress the essential contribution of NGOs in the promotion of policy in favour of gender's equality, children education, environmental protection and disability rights. NGOs have always boosted a bottom-up process for enhancing the international human right's framework. In that regard, non-governmental organisations carried out not only

[162] D. Otto, Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society, (1996) 18 *Human Rights Quarterly* 107.
[163] J. A. Scholte, *Civil Society and Democracy in Global Governance* (2001), Centre for the Study of Globalization and Regionalisation CSGR Working Paper No. 65/01.
[164] See T. M. Franck, The Emerging Right to Democratic Governance (1992) 86 *American Journal of International Law* 46.
[165] Art. 71 of the Charter of the United Nations (Chapter X: the Economic and Social Council), 26 June 1945.
[166] D. Otto, Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society (1996) 18 *Human Rights Quarterly* 107, p. 127.
[167] T. Mogami, The United Nations System as an Unfinished Revolution (1990) 15 *Alternatives* 177.

lobbying activities towards political institutions, but also campaigns to raise public awareness and understating of human rights issues and transnational law.[168] However, the restricted access to the UN decision-making process has not thwarted NGOs to inspire the international debate around significant issues.

The United Nations Conference on Environment and Development (UNCED) and the Fourth World Conference on Women (FWCW) are very recent example of the outstanding involvement of international civil society in the global arena.[169] Since the UNCED in 1992, there has been a call for a broadest public participation in poverty eradication and sustainable development. Transnational civil society groups were key players in this process, complementing the work of state actors and intergovernmental organisations.[170] Thus, the CRPD's elaboration is the highest point of the increasing activity of non-governmental organisations in the UN system.

5.1 Participatory democracy and global governance

Academic studies and political activists have often been concerned with making the global political system more democratic. Global governance is generally deemed as devoid of democratic legitimacy, because of the lack of civil participation, transparency and accountability.[171] By contrast, a different school of thought tends to underline that the proper yardstick for the analysis of international institutions is not a national model of democracy.[172] International organisations are therefore intrinsically unable to encompass direct democratic deliberations. They lack those essential

[168] J. A. Scholte, *Civil Society and Democracy in Global Governance* (2001), Centre for the Study of Globalization and Regionalisation CSGR Working Paper No. 65/01, p. 17.
[169] D. Otto, Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society (1996) 18 *Human Rights Quarterly* 107, p. 136.
[170] Leadership Council, Sustainable Development Solutions Network (2013): An Action Agenda for Sustainable Development; report to the UN Secretary General.
[171] J. A. Scholte, *Civil Society and Democracy in Global Governance*, Centre for the Study of Globalization and Regionalisation CSGR Working Paper No. 65/01, p. 12.
[172] See for instance G. Majone, *Regulating Europe* (London, Routledge, 1996;); G. Majone, 'Europe's Democratic Deficit', 4 *European Law Journal* (1998) 237; A. Moravcsik, Is there a 'Democratic Deficit' in World Politics? A Framework for Analysis (2004) 39 *Government and Opposition* 336.

democratic mechanisms provided by national political systems for direct electoral or interest group accountability.[173]

In light of this backdrop, the aim of the present research is not to equate national institutions and international bodies, or to argue that the latter will have to comply with the traditional model of representative democracy. However, it will be shown that the requirement of participatory democracy and the direct participation of civil society within the international legal processes may have a positive impact on global governance.

5.1.1 *Opening up the decision-making process*

The increasing participation of NGOs has a remarkable impact on the functioning of global governance, because it constitutes the starting point for opening up the international community's system. International institutions such as the WTO or the UN are pervaded by inadequate democratic standards.[174] This "democratic deficit" implies the absence of identifiable and accountable decision-makers along with transparent and open decision-making processes. International governance regimes are permeated by the existence of intergovernmental networks and relations which may exclude the participation of citizens from the decision-making.[175] However, international organisations hold that they are not obliged to guarantee any democratic requirements, because they are not elected by people and there is no collective transnational *demos* (in terms of supranational collective identity) to represent.[176]

The above scenario does not reflect the changing system of global governance, inasmuch the exponential increase of civil society and business groups that seek to participate in the decision-

[173] R. Dahl, 'Can International Organizations Be Democratic? A Skeptic's View', in I. Shapiro and C. Hacker-Cordon (eds), *Democracy's Edges* (Cambridge, Cambridge University Press, 1999), pp. 19–36.
[174] S. Joseph, *Blame it on the WTO?: A Human Rights Critique* (Published to Oxford Scholarship Online: September 2011).
[175] P. Nanz and J. Steffek, Global Governance, Participation and the Public Sphere (2004) 39 *Government and Opposition* 314.
[176] *Ibid,* p. 317.

making process. The model of participatory democracy requires an institutional and political framework that creates the conditions for a broader participation and consultation of civil society at the international level.[177] Participation is at the heart of political practice. Participatory conditions constitute essential requisites of a deliberative decision-making process that includes stakeholders and promote public participation. To this end, the process of deliberation should consider the preferences and interests of civil society.

Participatory democracy aims to strengthen the legitimacy of the entire global governance's framework by opening up the decisional procedures and involving more experts and organisations in shaping and delivering policy. The main contribution of civil society is represented by the possibility to guarantee visibility to stakeholders. In particular, NGOs are the voice of invisible groups of individuals who are not able to directly participate in social and political initiatives.[178] They can properly support stakeholders' concerns and provide specific information, expertise, analysis and reports to decision-makers. The active role of NGOs would enrich the international community's functioning and foster good governance.

5.1.2 *Ensuring transparent procedures*

NGO participation also represents a catalyst for enhancing the transparency of global governance. Transparency means openness of the policy and rule-making processes by means of clear procedures and accessible decisions.[179] It implies control and public scrutiny to encourage the adequate accountability of decision-makers.[180] Transparency constitutes a fundamental principle to apply for

[177] The origins of the model of participatory democracy can be traced in the political debates of the late 1960s and 1970s. See for instance, C. Pateman (1970) and C. B. Macpherson (1977). C. Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970) and C. B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977).
[178] J. Bebbington, J. Unerman, B. O' Dwyer, *Sustainability Accounting and Accountability* (2014, Routledge).
[179] D. A. Rondinelli and G. Shabbir Cheema, eds., *Reinventing Government in the Twenty-First Century: State Capacity in a Globalizing Society* (West Hartford, CT: Kumarian Press, 2003).
[180] A. Peters, The transparency of Global Governance, in Pazartzis, M. Gavouneli, A. Gourgourinis, M. Papadaki (eds), *Reconceptualising the Rule of Law in Global Governance, Resources, Investment & Trade* (Oxford: Hart Publishing 2015).

the elaboration of international treaties, because the majority of society is not always aware of the most important issues debated in the global arena. Civil society has appropriate instruments to involve citizens in sensitive topics of discussion and interact critically with policy makers. The role of civil society mitigates the "democratic deficit" of global governance and brings human rights concerns into international law.

The increasing request of a more transparent global governance also poses significant dilemmas concerning the importance to countervail competing legitimate interests, such as security, privacy and business secrets.[181] In this respect, it is worth noting that transparency should be considered as a legal presumption, as opposed to a strict and immovable rule. Accordingly, transparency entails the duty to justify, on the basis of clear and definite legal exceptions, the failure to provide public meetings and accessible documents. This obligation should be placed on the institutions in order to ensure the proper fulfilment of the transparency requirement.

The participation of civil society in the drafting process of the CRPD will now be examined. It will be shown that civil society has played a proactive role to improve the international protection of persons with disabilities and contributed to an open and transparent decision-making process.

5.2 Mainstreaming disability in the international agenda

International organisations for the rights of persons with disabilities have performed a fundamental task in order to mainstream disability into global agendas, frameworks and processes. Mainstreaming is the process of assessing the implications for persons with disabilities of any planned action, including legislation, policies or programmes, in any area and at all levels.[182] It is part of a strategy for promoting disability rights in the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres. To this end, NGOs advance

[181] *Ibid*, p.4.
[182] Commission for Social Development, Mainstreaming disability in the development agenda, Forty-sixth Session, 6-15 February 2008.

influential proposals, criticisms and perspectives for building an effective framework for the protection of persons with disabilities.

For instance, a crucial moment of the increasing activity of civil society was the World NGO Summit on Disability which took place in Beijing on the 12th of March 2001. During the summit, a resolution concerning the importance of introducing an international convention on the rights of all disabled people was adopted.[183] The resolution emphasised that "the full inclusion of people with disabilities in society requires our solidarity in working towards an international convention that legally binds nations, to reinforce the moral authority of the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities."[184] At a later stage, the involvement of NGOs in the drafting process of the CRPD has contributed to feed into the policy discussion, in particular with regard to the renewed concepts of disability, accessibility and multi-discrimination. It may be said that civil society has concrete tools to bring the interests of society into an international institutional system that facilitates participatory democracy.[185]

5.2.1 *"Nothing about us without us": a commitment to participatory democracy*

Article 4(3) of the CRPD lays down that "in the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations". This framework shows that civil society has been expressly recognised as a fundamental actor of the international community.

[183] G. Quinn and T. Degener with A. Bruce, C. Burke, Dr J. Castellino, P. Kenna, Dr U. Kilkelly, S. Quinlivan, *Human Rights and Disability - The current use and future potential of United Nations human rights instruments in the context of disability* (New York and Geneva, 2002).
[184] Beijing Declaration on Disabled Persons in the New Millennium, 12th of March 2001.
[185] See P. Herzog, Giving shape to a European civil society and opening up the institutional system (2001) in, O. De Schutter, N. Lebessis and J. Paterson (eds), Gov*ernance in the European Union*, p. 213-226.

The CRPD enshrines the motto "nothing about us without us" that illustrates the importance to actively involve persons with disabilities in planning and implementing strategies and policies that affect their lives. The definition of policies requires the active involvement of persons with disabilities and their organisations, in particular the participation of non-governmental organisations in the negotiations of the Convention. This slogan has been used by the majority of organisations for disabled people around the world in order to promote the full participation and equalisation of opportunities for, by and with persons with disabilities. Persons with disabilities have fully participated in the process for mainstreaming disability in the international arena and developing a truly inclusive society in which all voices are heard. The elaboration and final adoption of the CRPD demonstrates how civil society can effectively contribute to shape and influence international law.

5.2.2 *The participation of persons with disabilities in the Ad Hoc Committee*

In more practical terms, one may refer to the work done by disability organisations which started their lobbying activities towards the Ad Hoc Committee before its first meeting in July 2002 in order to obtain access to sessions and meetings.[186] The Ad Hoc Committee was in charge to take into account proposals and contributions for a disability rights treaty not only by States and relevant United Nations bodies, but also by observers, entities and agencies, regional commissions and intergovernmental organisations, as well as civil society including non-governmental organisations, national disability and human rights institutions and independent experts.

The pressure exercised by disability organisations and advocates produced successful outcomes. To give an example, the UN General Assembly adopted a resolution concerning the participation of persons with disabilities in the Ad Hoc Committee on a comprehensive and integral international

[186] M. A. Stein & J. E. Lord, Participation in International Agreements as Transformative Social Change: The UN Convention on the Rights of Persons with Disabilities, in *Making rights real*, ed., Cambridge University Press (2012).

Convention on protection and promotion of the rights and dignity of persons with disabilities.[187] Interestingly, the General Assembly recommended the Secretary General to facilitate the access and participation by persons with disabilities in the meetings and deliberations of the Ad Hoc Committee. To this end, the Assembly requested to organise the UN meetings in conference rooms well-equipped to facilitate the participation of persons with mobility-related and other physical disabilities. Moreover, it demanded the adoption, to the extent necessary and possible, of measures to enable persons with hearing disabilities to participate in the deliberations of the Ad Hoc Committee.

The General Assembly expressly introduced the conditions for a legitimate and active participation of non-governmental organisations in the discussion within the Ad Hoc Committee. The Assembly decided to allow the access to all non-governmental organisations enjoying consultative status with the Economic and Social Council.[188] The UN body extended the possibility to participate also to those NGOs not accredited previously to the Ad Hoc Committee. The Assembly gave the opportunity to the majority of non-accredited organisations to apply to the Secretariat for obtaining such accreditation, through the submission of all the information on the competence of the organisation and the relevance of its activities to the work of the Committee. The Ad Hoc Committee established certain and clear modalities for the NGOs participation in the debate concerning the adoption of a comprehensive international instrument on the rights of persons with disabilities.[189] In doing so, non-governmental organisations had the opportunity to attend any public meeting and make statements. They were also allowed to receive copies of the official documents and make written or other presentations.

[187] United Nations General Assembly, Decision 56/474, Participation of persons with disabilities in the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with disabilities, Fifty-sixth session, Agenda items 8 and 119 (b), 23 July 2002.
[188] United Nations General Assembly, Resolution 56/510, Accreditation and participation of non-governmental organizations in the Ad Hoc Committee on a Comprehensive and Integral Convention on the Protection of the Rights and Dignity of Persons with Disabilities, 109th plenary meeting 23 July 2002.
[189] Ad Hoc Committee on an international Convention, Decision on the modalities of the participation of accredited non-governmental organisations in the Ad Hoc Committee to consider proposal for a comprehensive and integral convention to promote and protect the rights and dignity of persons with disabilities, 2 August 2002.

It may be argued that the drafting process within the Ad Hoc Committee represented a unique opportunity for civil society organisations to lobby and advocate for the rights of persons with disabilities.

5.2.3 *The Working Group on the Convention: mixing state delegates and stakeholders*

The New Zealand's Ambassador Don McKay, Chairman of the Ad Hoc Committee, emphasised that the process of negotiating the CRPD "truly enshrined the slogan of the international disability movement, "nothing about us without us".[190] The involvement of NGOs in the drafting process reached its peak after the second meeting of the Ad Hoc Committee convened in June 2003. Thus, during this meeting, it was formally decided to set up a Working Group with the goal to prepare a draft text for the convention, which would have provided the basis for future negotiations by Member States.[191] Non-governmental stakeholders, such as the European Disability Forum, Disabled People's International and Rehabilitation International gave a significant contribution to the Convention's elaboration.

The Working Group was composed of twelve NGOs, one representative from a human rights institution (South African Human Rights Commission) and 27 representatives of national governments.[192] A fundamental role was performed by the Disabled Peoples International (DPI), a human rights organisation engaged in the protection of disabled people's rights and the promotion of their full and equal participation in society. DPI had the ability to draw together the initiatives of several disability organisations in order to speak with a single voice during the negotiations. To this end, international disability organisations and NGOs decided to create the International Disability

[190] D. McKay, The Convention on the Rights of Persons with Disabilities: A Benchmark for Action (2007) 56 *International Rehabilitation Reviews* 2.
[191] The Working Group established by the Ad Hoc Committee will meet from 5 to 16 January 2004 to draft a text of an international convention on the rights of persons with disabilities.
See also R. Lang, Human rights and disability - new and dynamic perspective with the united nations convention on disability, (2006) 17 *Asia Pacific Disability Rehabilitation Journal* 3.
[192] The Working Group has been established by the Ad Hoc Committee in order to meet from 5 to 16 January 2004 to draft a text of an international convention on the rights of persons with disabilities.

Caucus (IDC) for the shared scope to comment and influence the provisions' drafting. In doing so, DPI also favoured the participation of advocates from developing countries and arranged valuable workshop for enhancing the lobbying skills of the participants in the UN meetings.[193] An overview of the main results obtained by civil society groups within the CRPD's negotiations will now be presented.

5.2.4 *Civil society's main achievements*

The participation of organisations of people with disabilities along with human rights institutions as full members of the Working Group ensured that the Convention effectively took into account disabled rights.[194] It may be said that advocacy organisations successfully achieved a global recognition of disability as a human rights issue.

For instance, NGOs and National Human Rights Institutions (NHRIs) strongly advocated for the adoption of a definition of disability. To the same extent, they supported the adoption of a progressive social model rather than the traditional and restrictive medical approach of disability.[195] By contrast, state delegations preferred to avoid the inclusion of a comprehensive definition of disability that would have been discordant with narrow national laws.[196] The final adoption of fundamental guidelines reflecting the social model of disability symbolises a successful compromise obtained by virtue of the participation of non-governmental stakeholders in the drafting process.

To give another example, all German Disability Council associations, the European Women's Lobby and the International Disability Caucus promoted the acknowledgement of multi-discrimination

[193] M. A. Stein & J. E. Lord, Participation in International Agreements as Transformative Social Change: The UN Convention on the Rights of Persons with Disabilities (2008) 83 *Washington Law Review* 449.
[194] A. Dhanda, Constructing a new Human Rights lexicon: Convention on the Rights of Persons with Disabilities (2008) 5 SUR *International Journal of Human Rights* 42.
[195] G. de Búrca, The EU in the negotiation of the UN Disability Convention (2010) 35 Eur*opean Law Review* 174.
[196] H. Woodburn, Nothing about us without civil society: The role of civil society actors in the formation of the UN Convention on the Rights of Persons with Disabilities (2013) 7 *Political Perspectives* 75.

against women with disabilities in the CRPD's framework.[197] A twin-track approach based on both gender and disability grounds found the opposition of several State Parties, because of the existing protection guaranteed by the Convention on the Elimination of All Forms of Discrimination Against Women.[198] Nonetheless, disabilities organisations achieved the specific recognition of the vulnerability of women with disabilities within a separate and independent provision dealing exclusively with women's issues (Article 6 CRPD).

The unprecedented level of participation and lobbying activities of civil society groups brought about notable changes in the drafting of the Convention. The negotiations of the CRPD show an innovative and fascinating framework as regards the adoption of international legal instruments, because the participation of civil society has actively informed the process for making international human rights law. An overview of the specific involvement of NGOs in the national mechanisms for implementing the CRPD will be offered below.

5.3 The civil society's role in implementing the CRPD at national level

The significant contribution of NGOs to the development of a new participatory governance at the international and national levels emerges also from the framework for monitoring the implementation of the CRPD. It indeed calls for the full participation of civil society, in particular persons with disabilities and their representative organisations in the monitoring process. In other words, civil society is called to exercise an effective influence on the implementation of the law and the application of disability rights in practice. To this end, the Convention points out a fundamental

[197] S. Arnade & S. Haefner, *Standard Interpretation of the UN Convention on the Rights of Persons with Disabilities (CRPD) from a Female Perspective, Position and Reference Paper on the Significance of References to Women and Gender in the Convention on the Rights of Persons with Disabilities* (Berlin, Netzwerk Artikel, 2011).
[198] H. Woodburn, Nothing about us without civil society: The role of civil society actors in the formation of the UN Convention on the Rights of Persons with Disabilities (2013) 7 *Political Perspectives*, p.88.

institutional change in order to accelerate the concrete implementation of the rights of persons with disabilities.[199] Article 33(2) of the CRPD sets forth that:

> "States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights".

The idea to create independent mechanisms to promote, protect and monitor human rights in line with the *Paris Principle* is not completely new under international law.[200] The first treaty introducing these independent mechanisms was the 2006 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), which lays down the obligation to set up national mechanisms for the prevention of torture at the domestic level.[201] The establishment of independent national mechanisms represents a considerable opportunity to strengthen human rights protection. Indeed, international institutions cannot guarantee an appropriate level of respect for human rights without effective national systems that operate to achieve the same outcome. For this reason, the CRPD created a legal bridge between the international and national levels in order to facilitate structural changes and concretely improve the life of persons with disabilities. The Convention expressly refers to the *Paris Principle* for the creation of such mechanisms, as they constitute a set of international standards which frame the functioning of National Human Rights Institutions (NHRIs). These guidelines were adopted during the 1993 World Conference on Human

[199] G. De Beco, Article 33(2) of the Convention on the rights of persons with disabilities: another role for national human rights institutions? (2011) 29 *Netherlands Quarterly of Human Rights* 84.
[200] *Ibid*.
[201] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006.

Rights in Vienna and aim to guarantee the independent work of NHRIs for implementing human rights.[202]

5.3.1 *Institutionalising civil society*

NHRIs have important responsibilities such as the submission of opinions, recommendations, proposal and reports on any matters concerning the promotion and protection of human rights to the Government, Parliament and any other competent body.[203] Moreover, they perform the main task to foster and ensure the harmonisation of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation.[204] NHRIs should also "publicize human rights and efforts to combat all forms of discrimination by increasing public awareness, especially through information and education and by making use of all press organs".[205] NHRIs are dynamic and pluralistic hubs which incorporate State and non-State actors in compliance with the *Paris Principles*.[206] Interestingly, the involvement of civil society groups is expressly mentioned by the principles regarding the composition of such national mechanisms. According to the Paris Principles, the composition of national institutions and the appointment of its members "shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights". In particular, the NHRIs' structure should include specific categories such as: "non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists; trends

[202] Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993.
[203] *Ibid*, 3(A).
[204] *Ibid*, 3(B).
[205] *Ibid*, 3(G).
[206] G. De Beco, Article 33(2) of the Convention on the rights of persons with disabilities: another role for national human rights institutions?, 29 *Netherlands Quarterly of Human Rights*, p. 91.

in philosophical or religious thought; universities and qualified experts; Parliament and Government departments". [207]

This framework highlights the significant involvement of NGOs in the delicate process for reinforcing the rule of law and implementing human rights. National independent mechanisms can rely on the collaboration of NGOs that have awareness and expertise of issues concerning marginalised individuals. Article 33(2) of the CRPD represents fertile ground for the active inclusion of civil society in the complex challenge to bring rights home. At the European level, the direct participation of persons with disabilities emerges both from the composition of independent national institutions and their formal relationship with civil society. For instance, the British Equality and Human Rights Commission requires that at least one member of the 15 Commissioners is a person with disability.[208] The Scottish Human Rights Commission ought to be composed by Commissioners with NGO or academic backgrounds.[209] A broad representation of civil society can be found also in the composition of the Board of Trustees of the German Institute for Human Rights which encompasses human rights NGOs, media and academic exponents.[210] Particularly, in accordance with Art. 33(2) of the Convention, the German Government have founded the National CRPD Monitoring Body at the German Institute for Human Rights in May of 2009. Italy also has established a national Observatory on the situation of persons with disabilities that includes several members of NGOs and civic associations.[211]

In addition to the formal involvement of civil society representatives in the independent national bodies mentioned above, NGOs produce an influential impact in the monitoring process through positive actions and systematic engagements. A good practice is represented by the National CRPD

[207] Principle 1, Composition and guarantees of independence and pluralism, Paris Principles.
[208] Equality Act 2006, United Kingdom.
[209] European Union Agency for Fundamental Rights, *National Human Rights Institutions in the EU Member States, Strengthening the fundamental rights architecture in the EU* (Luxembourg, 2010).
[210] The German Institute for Human Rights was established in March 2001 on the recommendation of the German Federal Parliament.
[211] Act n. 18/2009 of March 3rd 2009, pursuant to inter-Ministerial decree of July 6th 2010, no. 16.

Monitoring Body in Germany which has the duty to assess the situation of persons with disabilities within the country on the base of regular meetings with disability advocacy organisations, inspections of care facilities and consultations with experts. To this end, it can release statements and recommendations in relation to political, administrative and judicial decisions.[212] This framework shows that the Monitoring Body works closely with civil society organisations, in fact it hosts the Civil Society Consultations in Berlin three times each year. Consultations take place in inclusive and accessible environments and promote the open exchange of experiences between the National CRPD Monitoring Body and civil society disability advocacy organisations. Moreover, the Civil Society Consultations also focus on the importance to plan shared strategies for the implementation of rights of persons with disabilities. Currently, the organisations regularly invited to participate in these events are over 60.[213] According to the rules of the German institute, consultations are theoretically open to all civic and non-governmental organisations that are interested in issues concerning the CRPD's application, but only those organisations formally invited by the Monitoring Body have the right to participate. However, Germany assimilated the fundamental objectives of Article 33(2) through the creation of a national institution tailored to the participatory requirements emphasised by the CRPD.

Undoubtedly, the cooperation with civil society is an essential element of the system outlined by the Convention in order to enrich the implementing process of the law. Indeed, the designation of independent and pluralistic mechanisms composed by NGOs and persons with disabilities fosters the implementation of the CRPD's provisions. The Convention recognises those obstacles that prevent State Parties to guarantee the protection of all vulnerable individuals and provides a flexible framework which promotes partnership between State and non-State actors. It is submitted here that it is necessary to maintain a sort of continuity between the contribution of disability rights advocacy groups to the CRPD's drafting and the following implementation process. In doing so, transformative

[212] Information on how the National CRPD Monitoring Body work is available on the following website: http://www.institut-fuer-menschenrechte.de/en/monitoring-body/.
[213] Deutsches Institut fuer menschenrechte, *Anhang: Überblick über die Organisationen der Verbändekonsultationen der Monitoring-Stelle zur UN-Behindertenrechtskonvention* (Stand: November 2014).

changes are more likely to occur by virtue of the permanent civil society's participation throughout the entire policy chain. In the EU context, several countries are acting in compliance with the principle of participatory democracy embodied in the innovative treaty's scenario. Different actors such as NHRIs, NGOs, human rights organisations and civic associations along with governments are fully involved at all levels for realising the ambitious goal of an inclusive society. Traditional legal tools, new bottom-up strategies and participatory conditions have to be combined to transpose international obligations into the national realm.

5.3.2 *Awareness-raising: a synergetic action between States Parties and NGOs*

Public campaigns and activities are also fundamental instruments to increase citizen's awareness of transnational issues and improve social attitudes towards persons with disabilities.[214] Public awareness and civic education can contribute to consolidate the legal framework for the protection of persons with disabilities. The concept of "awareness-raising" is expressly embodied in the CRPD and refers to the duty of States Parties to raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities.[215] States Parties have the positive obligation to introduce effective measures for combating stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age. Moreover, they are called to promote awareness of the capabilities and contributions of persons with disabilities.

Hence, the Convention recognises States Parties as duty-holders in the crucial process for awareness-raising on disabilities rights into the society and indicates specific measures for pursuing this objective. The measures required by Article 8(2) of the CRPD seek to change the social attitude towards persons with disabilities. To this end, they promote the improvement of the education system,

[214] J. A. Scholte, *Civil Society and Democracy in Global Governance*, Centre for the Study of Globalization and Regionalisation CSGR Working Paper No. 65/01, p. 17.
[215] Art. 8 (Awareness-raising) of the Convention on the rights of persons with disabilities.

the support of the media and the adoption of awareness-training programmes regarding persons with disabilities. Interestingly, the Convention provides the opportunity to implement human rights through "non-legislative methods" moving beyond the classical structures of previous international human rights treaties.[216]

In this pioneering framework, civic awareness on disability rights considerably depends on the efforts of those NGOs that are key players in raising awareness on such issues throughout society. The lack of participation of civil society at international or national level would jeopardise achieving this crucial objective. Thereby, States Parties cannot underestimate the fundamental contribution of NGOs for carrying out social education activities and attracting the attention of the media. The Convention confers an unprecedented duty upon State Parties to raise awareness on disability issues and requires the vital involvement of representative organisations of persons with disabilities in order to effectively bring change at national level. The synergetic action of States Parties and NGOs constitutes an essential partnership to engage the public community in a dynamic dialogue on disability rights, cultural and social values.

The next sub-section will investigate how participatory democracy has been applied in the EU framework. It will be demonstrated that the CRPD represents a positive benchmark to promote a structured participation of civil society groups in the decision-making process.

5.4 Participatory democracy in the EU: from the White Paper to the Lisbon Treaty

The striking involvement of NGOs in drafting, monitoring and implementing the UN CRPD raises challenging issues with regard to the role of civil society in the EU system. Indeed, the CRPD's adoption encourages the development of good governance at the international level and highlights the beneficial outcomes of the civil society's consultation. As mentioned above, Article 4(3) lays

[216] M. Stein and P. Stein P., Beyond disability rights (2007) 58 *Hastings Law Journal* 1203.
See also, P. Harpur, Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities, (2012) 27 *Disability & Society* 1.

down the crucial concept "nothing about us without us" in order to promote a permanent and productive consultation between governments and persons with disabilities.

Increased participatory rights are not incompatible with the traditional model of representative democracy, but rather constitute a fundamental tool to legitimate democracy and reinforce the idea of European citizenship.[217] European institutions have a long history of informal consultations with the voluntary sector. This form of cooperation was expressly acknowledged for the first time by Declaration 23 of the TEU, which stresses "the importance, in pursuing the objectives of Article 117 of the Treaty establishing the European Community, of cooperation between the latter and charitable associations and foundations as institutions responsible for welfare establishments and services". Civil society can therefore perform a complementary role in the decision-making process and ensures that policy makers at EU level systematically consider the perspectives and grassroots experiences of citizens to provide effective policies. In addition, voluntary associations can disseminate information from the European level down to the local level to increase citizens' awareness and promote a common European identity.

Against this background, the Commission proposed to avoid jeopardising creativity and free expression of civil society through over-bureaucratised or institutionalised procedures of consultation.[218] To this end, it recommended the introduction of flexible but systematic relations between the voluntary sector and the European institutions without compromising the principle of subsidiarity and the specificities of each Member State.

The necessity to update the EU political system has also been reaffirmed in the White Paper of the Commission on European Governance.[219] Political leaders indeed admitted the existence of an

[217] See L. Pech, La solution au 'déficit démocratique': une nouvelle gouvernance pour l'Union Européenne? (2003) 2 *Journal of European Integration* 131.
[218] Communication of the Commission, "Promoting the role of voluntary organisations and foundations in Europe", COM (97) 241 final, OJC95, 30.3.1998.
[219] Commission, European Governance —A White Paper, Com (2001) 428 final (2001/c 287/01).

increasing distrust towards EU institutions and the deep lack of confidence in a complex and undefinable system such as the European Union. As a result, the Commission put emphasis on the commitment to renew the EU political framework by means of a less top-down model and complementing its policies with non-legislative tools.[220] The White Paper basically reflects those fundamental values underlying the idea of participatory democracy and outlines five principles of good governance: openness, participation, accountability, effectiveness and coherence. The concept of openness affects the functioning of the EU institutions which should operate in a more open manner. They should constantly release communications concerning their actions and decisions in an accessible and understandable language for the general public. Participation influences the quality of EU policies and implies the involvement of civil society in the entire "policy chain, from conception to implementation, on the base of an inclusive approach".[221] Accountability requires a clarification of roles in the legislative and executive procedures with the purpose to assess political and legal responsibilities of EU institutions. Effectiveness concerns the adequate impact of policies at the national level and the proportional implementation of law, which have to respond to clear and shared objectives. In the end, coherence is an essential element of future EU policies to solve urgent issues related to climate and demographic changes, diversity and European enlargement. For this purpose, the White Paper calls for a strong political leadership and institutional responsibility to advance a cohesive approach within the EU multi-layered system. These strategic commitments launched by the Commission are still decisive and impelling matters in the current EU agenda.

Interestingly, the Treaty of Lisbon also emphasises the importance to strengthen the participation of civil society in the EU political debate. Thus, according to Article 15 of the TFEU:

[220] *Ibid.*
[221] *Ibid*, II. Principles of good governance.

- "In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.
- The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.
- Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph (….)"

The TFEU tends to move towards a broader participatory democracy for citizens in European affairs and recognises that political institutions have to build democratic connections with people to launch more effective and relevant policies.[222] However, despite these efforts, the EU continues to denote significant democratic shortcomings,[223] in particular with regard to the lack of procedural or "input legitimacy",[224] which requires the inclusion of those who are affected by a regulation in the decisional procedure.[225]

The concept of participatory democracy entails a decision-making process which involves all stakeholders and is based on "the action of interest groups and citizens initiatives".[226] It is distinguished from the idea of representative democracy that relies on a peculiar form of legitimacy

[222] European Commission, European Governance A White Paper, Doc/01/10, July 2001.
[223] See also D. Ferri, European Citizens… Mind the Gap! Some Reflections on Participatory Democracy in the EU (2013) 5 *Perspectives on Federalism* 56.
[224] F. Scharpf, *Governing in Europe* (Oxford University Press, 1999).
[225] D. Ferri, Participation in EU Governance: A "Multi-Level" Perspective and a "Multifold" Approach, (2015) *Citizen Participation in Multi-Level Democracies*, pp. 334.
[226] Opinion of the Economic and Social Committee on "The Role and contribution of civil society organisations in the building of Europe", CES 851/99, 22.9.1999, Point 5.2.

by input in accordance with citizens are represented at Union level by voting at European and national elections.[227]

5.4.1 *The inclusive process of the EUCFR's adoption: the "Convention" method*

Participatory democracy has not been fully realised in the European Union system, but significant developments are underway. For instance, the Charter of Fundamental Rights (EUCFR) was adopted on the basis of an unusually transparent and inclusive process.[228] During the drafting of the Charter there was a wide and plural participation of different actors such as jurists, human rights experts of the EU legal order, NGOs and civic associations. The Charter's elaboration has seen the coexistence of legal technicians and political advocacy groups. According to Olivier De Schutter, the total openness of the decisional procedure encourages the legitimacy of the process, but it requires a "structured" participation of civil society.[229]

The scholar underlined the side effects provoked by an open and broad participation without definite rules and guidelines. During the Charter's drafting, this openness shifted the power from its 62 members to the Secretariat of the Convention engaged with the evaluation of several amendments presented to reshape the final document. Moreover, the collective decision on the Charter brought about a fragmentation of responsibilities, because none of the actors claimed the paternity of the deliberation. The lack of certain rules concerning the requirements to participate in the drafting process downgraded the right "to be consulted" to a simple right to "freedom of expression". In light of these deficiencies, Olivier De Schutter suggested to open up intergovernmental conferences to those organisations that represent common concerns at the EU level by adopting formal procedures to select those interest groups that can effectively inform the deliberative process.

[227] O. De Schutter, Europe in Search of its Civil Society (2002) 8 *European Law Journal* 198.
[228] *Ibid.*
[229] *Ibid,* p. 208.

In the first place, civil society organisations have to represent interests of European society and be permanently based in the European Union. The criteria of "representativeness" must be the first requirement to assess in order to allow these organisations to take part in the decision-making process. The Economic and Social Committee also states that "the assessment of the degree of representativeness of NGOs must under no circumstances be based solely on quantitative criteria, it must also involve qualitative criteria". [230] The Committee holds that representativeness of civic organisations should be measured not only in relation to the amount of members whom they represent, but the "judgement must take account of the ability of such bodies to put forward constructive proposal and to bring specialist knowledge to the process of democratic opinion-forming and decision-making".[231] Therefore, NGOs have to guarantee an adequate level of expertise to flesh out the political arena and establish a real dialogue with the EU institutions. In this framework, civil organisations would not merely have the right to be heard, but they would be entitled to receive feedback concerning the impact of their proposals on the decision-making process.

The "Convention method" has also been applied during the elaboration of the EU Constitutional Treaty, which attracted the attention of civil society's organisations and participatory democracy advocates.[232] However, the drafting of the European Charter of Fundamental Rights still symbolises the most relevant experiment in good governance at the EU level, but at the same time it reveals shortcomings and weaknesses of an incomplete model of participatory democracy. The concept of participatory governance is a crucial point of reference for the European Union's future and requires an output-oriented paradigm of citizen involvement. This governance approach intended "as a process

[230] Opinion of the Economic and Social Committee on the Comission discussion paper "The Commission and non-governmental organisations: building a stronger partnership" (COM(2001) 11 final), CES 811/2000, 13.7.2000, point 2.2.5., p, 4.
[231] *Ibid*, p.4.
[232] B. Finke, Civil society participation in EU governance (2007) 2 *Living Reviews in European Governance* 4.

and a state whereby public and private actors engage in the international regulation of societal relationships and conflicts"[233] is a necessary condition for the development of the EU system.

5.4.2 *How to improve EU participatory democracy? The good practice of the CRPD*

The CRPD's adoption constitutes a good exercise of participatory democracy, which offers some guidelines to structure the participation of civil society in the political arena. A focal point regards the accreditation and participation of non-governmental organisations in the decision-making process.

The drafting of the Charter of Fundamental Rights has been characterised by a total and "random" openness. This means that the participation of NGOs in the decision-making process has not been informed by clear guidelines to assess the "representativeness" of the civil society groups. By contrast, the involvement of NGOs in the Ad Hoc Committee's work has been regulated by precise and formal rules. As mentioned in Paragraph 4, the accreditation of NGOs has been granted to all non-governmental organisations enjoying consultative status with the Economic and Social Council.[234] In addition, the participation has also been broadened to those NGOs that could demonstrate they carry out relevant activities in respect to the work of the Committee. The application to be accredited to the Ad Hoc Committee was also based on clear requirements and accurate conditions. The NGOs had to submit an application package containing specific information such as "the purpose of the organization, the programs and activities of the organisations in areas relevant to the Ad Hoc Committee, confirmation of the activities of the organization at the national, regional or international level, copies of the annual or other reports of the organization with financial statements, a description of the membership of the organizations and a copy of the constitution and by-laws of

[233] B. Kohler-Koch and B. Rittenberger, Review Article: the Governance turn in EU studies (2006) 3 *Journal of Common Market Studies* 205.

[234] United Nations General Assembly, Resolution 56/510, Accreditation and participation of non-governmental organizations in the Ad Hoc Committee on a Comprehensive and Integral Convention on the Protection of the Rights and Dignity of Persons with Disabilities, 109th plenary meeting 23 July 2002.

the organization".[235] In this way, the participation of civil society groups in the decision-making process has been well structured and formalised. However, it may be argued that the establishment of precise rules concerning the participation of civil society is easier when the treaty being drafted focuses on a very specific issue (disability rights) rather than a whole set of human rights. This statement may be debunked by underling the legal complexity of an international human rights treaty such as the CRPD. It indeed addresses several aspects of human rights law as accessibility, gender equality, legal capacity, health and development, work, education, situations of risks and humanitarian emergencies. The involvement of NGOs with different backgrounds and objectives has contributed to improve the quality of the protection ensured by the CRPD.

Those NGOs involved in the CRPD's elaboration properly represented the main civil society's interests and met the qualitative criteria established by the Economic and Social Committee. The lack of appropriate "representativeness" that reduced the quality of the democratic participation in the Charter's drafting has been successfully overcome in the UN Convention's framework. The model of participatory democracy embodied in the CRPD may offer important solutions in respect to the problem of "representativeness" which undermines the functioning of global and EU governance. Civil society groups may indeed not reflect all the interests for which it purports to act and increase inequalities related to class, gender, nationality, race and religion in case it depicts a disproportional representation of society.[236] To avoid "fake" inclusiveness, the involvement of civil organisations in deliberative procedures should be based on a strict control of their representative capacity. This assessment should be mainly focused on qualitative criteria, such as the capacity of the NGOs to represent common interests and carry out effective advocacy activities. In the CRPD's context, necessary prerequisites have been clarified *ex-ante* in order to prove the high quality of the NGOs'

[235] Ad Hoc Committee, Seventh Session, Information Note for NGOs, Participation in the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 16 January- 03 February 2006.
[236] J. A. Scholte, *Civil Society and Democracy in Global Governance*, Centre for the Study of Globalization and Regionalisation CSGR Working Paper No. 65/01, p. 20.

activities for promoting disabilities rights at the international level and obtain the accreditation to the Ad hoc Committee. A structured participation also contributes to consolidate the NGOs' efforts that would "receive appropriate feedback on how their contributions and opinions have affected the eventual policy decision, thereby making the relationship a real dialogue".[237] To conclude, the imposition of certain requirements for authorising the participation of civic organisations in the institutional system constitutes an essential condition to enhance the effectiveness of the civil dialogue. Such a structuration would not hamper the autonomy of civil organisations; on the contrary it promotes the participation of "representative" groups that can advance constructive proposals and bring relevant expertise to the decision-making process.

In light of these observations, civil dialogue stands out for its beneficial effects in the political and legal background of the CRPD. Participatory rights are actively emerging both from the new international human rights instruments and the increasing demand of good governance at the EU level. The institutional architecture of the European Union now opens the doors to civil society. Article 15 TFEU is a key provision to further enhance "input legitimacy". In particular, the European Union should learn the lesson from the CRPD's framework and promote a structured participation of civil society in the decision-making process. The legal challenges stemming from the EU's ratification of the CRPD are an unmissable opportunity to start a new participatory democratic course which gives a voice to invisible groups of people and produces effective equality norms.

[237] Commission Discussion Paper, The Commission and Non-Governmental Organisations: building a stronger partnership, presented by President Prodi and Vice-President Kinnock the 18th of January 2000.

CHAPTER 3

THE EU LEGAL FRAMEWORK

1. An overview of the prohibition of discrimination under EU law

The concepts of equality and non-discrimination are deeply rooted in the EU legal framework. Article 2 of TEU for instance establishes that:

> "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

Moreover, Article 3(3) TEU points out that the Union "shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child".

Currently, the Treaty of Lisbon has helped consolidate the principles of equality and non-discrimination as fundamental values of the Union by imposing a mainstreaming duty to prohibit discrimination on EU institutions. Article 10 TFEU, as amended by the Treaty of Lisbon, lays down that "in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". Actions to address discrimination require the consent procedure in accordance with the consent of the European Parliament is needed in order to adopt a Directive. Indeed, Article 19 of the TFEU sets out that:

> "Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

According to the latter provisions, EU secondary law has to promote equality and ensure the protection against discrimination in the EU legal context. The importance of the prohibition of discrimination has also been confirmed by the CJEU in the famous case of *Mangold v Helm,*[238] where the Court declared non-discrimination on grounds of age to be a general principle of Community law.[239]

1.1 The EU Charter of Fundamental Rights

The right to equality and non-discrimination also plays a significant role in the Charter of Fundamental Rights of the EU, which has acquired a legally binding status after the entry into force of the Treaty of Lisbon.[240] The Charter now binds both the EU institutions and Member States when they act within the scope of EU law [241] Article 21 of the Charter states that:

> 1. "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."
> 2. "Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited."

The Charter provides a wider list of possible grounds of discriminations in comparison with the European Treaties as amended by the Lisbon Treaty, but at the same time it does not introduce any new rights in the area of EU anti-discrimination law. The Charter only "addresses discriminations by

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[238] *Werner Mangold v Rüdiger Helm* (2005) ECJ, C-144/04.
[239] L. Pech, Between judicial minimalism and avoidance: the Court of Justice's sidestepping of fundamental constitutional issues in Römer and Dominguez, (2012) 49(6) *Common Market Law Review* 1841.
Ibid, para 75. "The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. Where national rules fall within the scope of Community law, which is the case with Paragraph 14(3) of the TzBfG, as amended by the Law of 2002, as being a measure implementing Directive 1999/70 (see also, in this respect, paragraphs 51 and 64 above), and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle (Case C-442/00 Rodriguez Caballero [2002] ECR I-11915, paragraphs 30 to 32)".
[240] Charter of Fundamental Rights of the European Union (2000) OJ C 364/01.
[241] G. de Búrca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?" (2013) 20 *Maastricht Journal of European and Comparative Law* 168.

the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law".[242] The Charter however represents an essential instrument for the interpretation of provisions of EU law, which contributes to improve the protection of fundamental human rights within the European Union. Article 47 of the EU Charter sets out the right to an effective remedy to everyone whose rights and freedoms guaranteed by the law of the Union might have been violated by executive power.

As a result, the CJEU has been placed at the heart of the new EU architecture on fundamental rights and symbolises the key guarantor of the Charter.[243] The Court's legal reasoning has often made reference to the Charter's content since it became a legally binding instrument of EU law.[244] The positive impact of the Charter on the EU case law is particularly evident in the Area of Freedom, Security and Justice.[245] The Charter's norms strongly influenced the CJEU's interpretation in the field of asylum law and with regard to the rights of the child.[246] According to the Commission's report, the European Union Courts have increasingly referred to the Charter in their judgements.[247] The number of decisions quoting the Charter developed from 43 in 2011 to 87 in 2012. In 2013, this number amounted to 113 and exponentially increased to 210 cases in 2014, while in 2015 it settled at 167.[248]

[242] Explanations (1) relating to the Charter of Fundamental Rights (2007) OJ C 303/02, Explanation on Article 21 Non-discrimination.
[243] S. Carrera, M. De Somer and B. Petkova, '*The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice'* (2012) 49 CEPS, Justice and Home Affairs Liberty and Security in Europe Papers.
[244] G. de Búrca, After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?", 20 *Maastricht Journal of European and Comparative Law* 168, p. 169.
[245] S. Iglesias Sánchez, The Court and the Charter: the impact of the entry into force of the Lisbon treaty on the ECJ's approach to fundamental rights (2012) 49 Common Market Law Review 1565.
[246] See for instance with regard to the right of asylum, Joined Cases C-175, 176, 178 & 179/08, *Salahadin Abdulla and others*, [2010] ECR I-1493; See with regard to the right of the child, included in Art. 24, to maintain contact with both parents, Case C-403/09 *PPU, Detic˘ek*, [2009] ECR I-12193; Case C-211/10 PPU, Doris Povse, [2010] ECR I-6673.
[247] EU Commission, *2014 Report on the application of the EU Charter of Fundamental Rights* (Luxembourg: Publications Office of the European Union, 2015).
[248] EU Commission, *2015 report on the application of the EU Charter of Fundamental Rights* (Luxembourg: Publications Office of the European Union, 2016).

1.2 The Convention for the Protection of Human Rights and Fundamental Freedoms

Ultimately, it is worth noting that disability is not expressly included in the list of prohibited grounds of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Article 14 of ECHR merely states that "the enjoyment of the rights and freedoms (…) shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Despite that, the Court of Strasbourg, in the case of *Glor v. Switzerland*, reiterated that Article 14 contains a non-exhaustive list of prohibited grounds, which also includes discrimination based on disability.[249]

Interestingly, the accession of the EU to the Convention became a legal obligation under the Treaty of Lisbon. Article 6(2) of the TEU, as amended by the Lisbon Treaty, provides that the European Union "shall accede" to the Convention. The EU's accession to the ECHR would bring about a comprehensive and coherent legal framework for protecting human rights across the continent. EU law would be subject to external control to ensure the observance of the rights and freedoms of the ECHR. However, the accession to the Convention may create several issues in relation to the autonomy of the EU's legal order, the EU competences and the CJEU's position as the ultimate guardian of EU law.[250] In April 2013, following almost three years of technical discussions, a revised draft agreement was finalised from the 47 Council of Europe countries and the Commission to regulate the EU accession to the ECHR.[251] In July 2013, the European Commission asked the CJEU for an opinion concerning the compatibility of the draft agreement with the EU Treaties. The Court concluded that the draft agreement is not compatible with EU law and provided a checklist of

[249] ECtHR, G*lor v. Switzerland* case, application No. 13444/04, judgement 30 April 2009.
[250] X. Groussot, T. Lock and L. Pech, *EU Accession to the European Convention on Human Rights: A Legal Assessment of the Draft Accession Agreement of 14th October 2011* (2011) Foundation Robert Schuman, European issues n°218.
[251] Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, Final report to the CDDH, Strasbourg, 10 June 2013.

amendments to ensure its compatibility with the EU Treaties.[252] This context shows that the EU accession under the current draft agreement has become highly complicated. It is hoped therefore that ECHR and EU authorities will find durable solutions to harmonise the judicial work of the ECtHR and the CJEU enhancing the protection of fundamental fights in the Union system.

Following this brief overview of the new human rights framework in the EU following the Lisbon Treaty, it is worth repeating that the principles of equality and non-discrimination are seen as central goals in the EU system for the protection of human rights. The EU's political and legal approach towards disability rights will be briefly discussed below.

2. Disability rights in the European Union

Disability policy has always been regarded as part of the European social agenda.[253] EU social policy was consolidated by the introduction of the Treaty of Amsterdam on May 1, 1999. A remarkable aspect of the Treaty establishing the European Community, as amended by the Treaty of Amsterdam, was the adoption of a new anti-discrimination provision.[254] According to Article 13 of the EC Treaty:

> "without prejudice to the other provisions of this Treaty, and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission, and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

The inclusion of this article brought about a ground-breaking change at EU level, to the extent that it laid down the competence of the Community to launch legal measures to counteract discriminations on grounds of disability for the first time.[255] European disability policy has since been characterised

[252] Opinion of the Court (Full Court) of 18 December 2014. Opinion pursuant to Article 218(11), ECLI:EU:C:2014:2454.
[253] A. Waldschmidt, 'Disability Policy of the European Union: the Supranational Level' (2009), 4 *ALTER European Journal of Disability Research* 8.
[254] I. Bryan, 'Equality and Freedom from Discrimination: Article 13 EU Treaty' (2002), 24 *Journal of Social Welfare and Family Law* 223.
[255] E. Howard, 'The EU Race Directive: Time for Change?' (2007) 8 I*nternational Journal of Discrimination and Law* 237.

by a rights-based approach which enshrines civil and social rights.[256] The key idea of this approach is that societal factors operate to exclude persons with persons with disabilities from full participating in society. As a consequence, such disabling barriers should be tackled by laws and policies to guarantee equal opportunity to persons with disabilities.[257]

In more practical terms, this led the Commission to enact a Community action programme (HELIOS I) to promote vocational training and rehabilitation, economic integration, social integration and an independent way of life for disabled people.[258] It also adopted a second programme to improve social integration and employment for persons with disabilities[259]. Moreover, a third disability programme (HELIOS II) was introduced to foster equal opportunities for and the integration of disabled people. This programme stressed the importance of the political mobilisation of persons with disabilities and established therefore the European Disability Forum (EDF).[260] Lastly, the 1993 Social Policy Green Paper introduced the fundamental concept of "mainstreaming" intended as "acceptance of people as full members of society, with opportunities for integrated education, training and employment, and to lead their lives independently".[261] This new approach aimed to accelerate the integration of persons with disabilities in ordinary schools and their effective inclusion in the open labour market. In line with these important changes, at the end of November 2000, the Council of Ministers adopted an "anti-discrimination package" comprising two fundamental legal instruments: the Race Directive[262]

[256] D. Mabbett, 'The Development of Rights-based Social Policy in the European Union: The Example of Disability Rights' (2005) 43 *Journal of Common Market Studies* 97.
[257] A. Lawson. The EU Rights Based Approach to Disability: Strategies for Shaping an Inclusive Society (2005) 6 *International Journal of Discrimination and the Law* 4269.
[258] HELIOS I (Second) Community Social Action Programme for Disabled People (1988) OJ L104/38.
[259] Memorandum of the Commission to the Council concerning the employment of disabled people in the European Community (COM 86(9) of 24 January 1986).
[260] HELIOS II (Third) Community Action Programme to Assist Disabled People (1993) OJ L56/30.
See also, D. Mabbett, 'The Development of Rights-based Social Policy in the European Union: The Example of Disability Rights' (2005) 43 *Journal of Common Market Studies*, p. 108.
[261] European Commission (1993) Green Paper European Social Policy: Options for the Union, Brussels, p. 48.
[262] Directive 2000/43/EC of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] O.J. L 180/22.

and the Framework Equality Directive.[263] The next section will focus on the provisions introduced by the Framework Equality Directive and the legal protection it afforded to persons with disabilities.

3. The EU anti-discrimination framework: Directive 2000/78/EC

The Framework Equality Directive (2000/78/EC, henceforth the Directive) lays down a general framework for combating discrimination on grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation. The material scope of the Directive is confined to the area of employment and occupation.[264] By contrast, the Racial Equality Directive also covers access to and supply of goods and services, housing, education, transport, healthcare, social security and social assistance.[265]

The objective of the Directive is to ensure that persons with disabilities do not suffer discrimination and instead enjoy equal treatment in the workplace. To this end, Article 2 of the Directive establishes that "the principle of equal treatment shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1". The Directive also considers harassment (Art. 2.3) and instruction to discriminate (Art. 2.4) as different forms of prohibited discrimination. A general overview of the legal categories introduced by the Directive will be offered below with a focus on those decisions of national courts applying the prohibition of discrimination.

3.1 Exploring the meaning of direct discrimination

According to Article 2(2) (a) of the Directive, direct discrimination on grounds of disability occurs "where one person is treated less favourably than another is, has been or would be treated in a comparable situation". The assessment of the less favourable treatment should be based on a

[263] Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] O.J. L 303/16.
[264] R. Whittle, 'The Framework Directive for Equal Treatment in Employment and Occupation: an Analysis from a Disability Rights Perspective' (2002) 27 *European Law Review 303*.
[265] L. Waddington and A. Lawson, *Disability and non-discrimination law in the European Union* (Luxembourg Publications Office of the European Union 2009).

comparative exercise. To this end, the comparator must not have the same characteristic as the claimant and must enjoy a better treatment.[266] However, in the situation where it is not possible to identify the comparator, the Directive allows a comparison with a *previous* or *hypothetica*l comparator by referring to another person who "*has been*" or "*would be*" treated more favourably.[267]

3.1.1 *The previous or hypothetical comparator*

The case of *Aylott v Stockton on Tees Borough Council* illustrates the concrete application of this particular comparative approach.[268] The claimant suffered from bipolar disorder and he submitted several complaints against colleagues, including for bullying, before going on paid leave. After returning to work, his performance was strictly monitored. Once again, he fell ill and was accused by his manager to be unprofessional, intimidating and displaying inappropriate behaviours towards other colleagues. The employer suspended him and after several months of absence due to his sickness, he was ultimately dismissed on the grounds of capability.

The Employment Tribunal (ET) found that this treatment amounted to direct discrimination on grounds of disability. In absence of an actual comparator, the ET held that the appropriate comparator was an individual who had been off for a similar number of days without having the same disability as the claimant. The ET finally considered that the comparator who had a similar sickness record in respect of, for example, a complicated broken bone or other surgical problem, would not have been subjected to the same treatment.

This judgement reflects the approach of the Directive that aims to enlarge the protection of persons with disabilities and allows a comparison also with a hypothetical comparator. The Employment

[266] L. Waddington, Fine-tuning non-discrimination law: exceptions and justifications allowing for different treatment on the ground of disability (2014) *International Journal of Discrimination and Law* 1.
[267] R. Whittle, The concept of disability discrimination and its legal construction. (2001) in *'Discrimination and affirmative action on the labour market – legal perspectives'* (in preparation of the Swedish Presidency of the European Union), National Institute for Working Life, Sweden, 6-7 November 2001.
[268] *Aylott v Stockton on Tees Borough Council*, Court of Appeal, July 2010, [2010] EWCA Civ 910.

Appeal Tribunal (EAT) however rejected the first decision of the ET and confirmed a restrictive test for disability-related discrimination. The EAT established that "for a meaningful comparison to be made, the hypothetical comparator should have all the attributes or features which materially affected the employer's decision to carry out the act which is said to be discriminatory." [269] This decision of the EAT required the hypothetical comparator to have all the relevant attributes or features of the complainant and therefore reduced the guarantees in favour of persons with disabilities, who have to demonstrate the existence of a "clone".[270] By contrast, the Framework Directive seems to permit the comparison with an individual who receives a better treatment in a similar situation without sharing the same characteristic of the claimant.

3.1.2 *Identifying the suitable comparator*

The Directive does not merely allow the possibility to compare a disabled person with a non-disabled individual, but it offers the additional opportunity to draw a comparator by referring to a person with different disabilities. Indeed, the term "another" used by the Directive constitutes an open clause for identifying the comparator.[271] The Directive's approach aims to overcome the legal shortcomings of those national legislations that only take into account comparisons between a person who has a disability and another who has not.

The case of *Granovsky v. Canada* may be used to illustrate how to identify the proper comparator in order to prove a discriminatory treatment.[272] The claimant challenged the constitutional validity of the Canada Pension Plan (CPP) that guarantees income benefits in the case of retirement, disability, or death.[273] The CPP provides disability benefits to persons who are permanently disabled and have

[269] *Aylott v Stockton on Tees Borough Council*, para. 35.
[270] R. Oulton, When is a clone not a clone? (2009) *New Law Journal* 1158.
[271] R. Whittle, The concept of disability discrimination and its legal construction. (2001) in *'Discrimination and affirmative action on the labour market – legal perspectives'* (in preparation of the Swedish Presidency of the European Union), National Institute for Working Life, Sweden, 6-7 November 2001, p.5.
[272] *Granovsky v. Canada* (Minister of Employment and Immigration), [2000] 1 S.C.R. 703.
[273] E. Chadha and L. Schatz, "Human Dignity and Ecnomic Integrity for Persons with Disabilities: A Commentary on the Supreme Court's Decisions in Granovsky and Martin." (2004) 19 *Journal of Law and Social Policy* 94.

paid sufficient earnings contributions. Mr. Granovsky injured his back at work and was assessed by workers' compensation as "temporarily totally disabled". Thirteen years later, after various jobs, he applied for a permanent disability pension under the Canada Pension. His application was rejected because he missed to make the required CPP payment during the relevant ten-year period prior to the application.[274] Mr. Granovsky did not fall under the protection of the "drop-out" provision, according to which periods of permanent disability causing absence from employment are not counted in the contribution calculation. In this context, Mr. Granovsky claimed the violation of the right to equality. Interestingly, the claimant argued that the appropriate comparator was not a permanently disabled individual, but a non-disabled worker who is able to pay the contributions in compliance with the CPP.

The Court held that the claimant wrongly identified the comparator, because non-disabled employees are not disabled and, thus, have no need "to resort to the drop-out provision".[275] As a consequence, in this case, the Court considered permanently disabled persons as the appropriate comparator group. The Canadian Court admitted the possibility to evaluate a comparison with individuals with different disabilities. This judgement is highly interesting as it shows the importance of selecting a comparator that is relevant for the legal analysis. Although the present case does not fall within the EU legal framework, it exemplifies a concrete application of the provision that prohibits "direct discrimination" under the Framework Directive. Article 2(2)(a) gives the opportunity to draw a comparator by referring to a person with different disabilities. This case may help to understand the purpose of the Directive and its possible implications with regard to EU case law.

[274] F. Sampson, Granovsky v. Canada (Minister of Employment and Immigration): Adding Insult to Injury? (2005) 17 *Canadian Journal of Women and the Law* 71.
[275] *Granovsky v Canada*, at para. 49.

3.2 Introducing the concept of indirect discrimination

Article 2(2)(b) of the Framework Directive lays down a comprehensive definition of indirect discrimination according to which:

> "Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
>
> 1. that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
> 2. as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice."[276]

This prohibition constitutes a fundamental tool for achieving substantive equality and reinforcing the protection of vulnerable groups of individuals. In the case of *S. Coleman v Attridge Law*, the General Advocate of the CJEU stated that indirect discrimination should be intended as an inclusionary mechanism "by obliging employers to take into account and accommodate the needs of individuals with certain characteristics".[277] Indirect discrimination may indeed occur where an employer's neutral policy or practice puts an employee in a disadvantaged position in comparison with other employees.[278] For instance, a job recruitment process that requires presentation skills may indirectly discriminate an applicant who suffers from stammer, in particular where the presentation skills are not relevant to the job. This neutral practice is likely to be regarded as "indirect discrimination" in accordance with EU law. The Directive places great emphasis on this prohibition as it represents a

[276] Article 2(2)(b) of Directive 2000/78/EC.
[277] Opinion of Advocate General Poiares Maduro of 31 January 2008, Case C-303/06, *Coleman v Attridge Law* (2008).
[278] European Commission, European Anti-Discrimination Law Review the European Network of Legal Experts in the non-discrimination field, Issue 18 (2014), p. 30.

significant percentage of disability discrimination and considerably enlarges the protection for persons with disabilities. [279]

In section 4.2 infra, the case of *Ring and Skouboe-Werge* will be analysed to illustrate the CJEU's understanding of indirect discrimination under Directive 2000/78/EC.

3.3 Reasonable accommodation: the paramount obligation

The main duty imposed upon employers by the Directive regards the introduction of necessary adaptations to the workplace in order to accommodate the special needs of persons with disabilities. Article 5 of the Directive lays down that:

> "In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

The obligation to provide reasonable accommodation is the cornerstone of the Directive because it seeks to enable persons with disabilities to have access to, participate in, or advance in employment. The assessment of the proper accommodation must be based on a specific analysis of the individual situation and the employment at issue.[280] However, the Directive determines the appropriate measures to adapt the workplace to the disability, such as the adaptation of premises and equipment, patters of working time, the distribution of tasks or the provision of training or integration resources.[281] The

[279] R. Whittle, 'The Framework Directive for Equal Treatment in Employment and Occupation: an Analysis from a Disability Rights Perspective' (2001) in *'Discrimination and affirmative action on the labour market – legal perspectives'*, p. 5.
[280] L. Waddington and A. Lawson, *Disability and non-discrimination law in the European Union. An analysis of disability discrimination law within and beyond the employment field*, European Network of Legal Experts in the non-discrimination field (Luxembourg: Publications Office of the European Union, 2009), p. 6.
[281] Recital 20 of the Preamble to the Framework Equality Directive 2000/78.

reasonable accommodation must not impose an excessive inconvenience or cost on the employer. Recital 21 of the Preamble sets out the "disproportionate burden" limit that should take into account the financial cost of the measures entailed the scale and financial resources of the organisation and the possibility of obtaining public funding.

It may be said that the EU provision reflects the content of Article 2 CRPD, which defines the meaning of reasonable accommodation.[282] Hence, the duty to guarantee reasonable accommodations requires positive obligations to remove environmental barriers and a concrete application of the principle of substantive equality.[283]

A brief overview of the main legal concepts under the Directive 2000/78 has been offered above. The next section seeks to assess the impact of the CRPD on EU equality law through an analysis of the CJEU's case law.

4. Filling in the gap: the evolving concept of disability

In order to apply the legal guarantees enshrined in the EU Framework Directive, the first fundamental step is to identify the conditions for a person to be classed as having disabilities. The Directive does not provide for a definition of disability or general guidelines on the personal scope of the legislation.[284] Therefore, national courts have faced serious obstacles in regard to the interpretation of the prohibition of discrimination on grounds of disability in the absence of any assistance from the Court of Justice. This is why the debate surrounding the legal category of disability quickly became

[282] Art. 2(4) CRPD: Reasonable accommodation "means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".
[283] J. E. Lord and R. Brown, 'The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities' in M.H. Rioux, L.A. Basser and M. Jones (eds), *Critical Perspectives on Human Rights and Disability Policy* (Martinus Nijhoff, The Hague, 2011).
[284] L. Waddington and A. Lawson, *Disability and non-discrimination law in the European Union. An analysis of disability discrimination law within and beyond the employment field*, European Network of Legal Experts in the non-discrimination field (Luxembourg: Publications Office of the European Union, 2009), p. 14.

a crucial issue for the European Court of Justice to address.[285] This section will focus on the analysis of the main judgements of the CJEU concerning the application of the Framework Directive in order to examine to what extent relevant EU provisions are concretely implemented. It will aim to clarify the concept of disability and examine how the CJEU is dealing with the interpretation of the CRPD.

4.1 The EU approach to disability

The first important case referred to the CJEU with the purpose of clarifying the provision of the Directive that prohibits disability discrimination was *Chacón Navas v. Eurest Colectividades SA.*[286] In this case, the national court asked whether a worker who had been dismissed solely because of her sickness could fall under the protection of the Directive. In addition, the national court referred another question in relation to the possibility of adding "sickness" to the list of protected grounds covered by the Directive.

The preliminary ruling before the CJEU originated from national proceedings between Ms Chacón Navas and Eurest Colectividades SA ('Eurest') concerning her dismissal whilst she was on leave of absence from her employment on grounds of sickness. Sonia Chacón Navas was employed by Eurest, a company specialising in catering, and she was certified as unable to work on grounds of sickness. She was considered by the Public Health Service to not be in a position to return to work in the short term. The applicant was forced to stay at home for eight months due to her illness after which, on the 28th of May 2004, she received written notice of her dismissal. However, the notification letter did not lay down any specific reasons for the dismissal, whilst acknowledging that it was unlawful and offering her compensation. In the action before the Spanish court, Navas sought a declaratory judgement that her dismissal was void on the grounds of the unequal treatment and discrimination to

[285] M. Bell, 'The Implementation of European Anti-Discrimination Directives: Converging towards a Common Model? '(2008) 79 *The Political Quarterly* 36.
[286] Case C-13/05 *Chacón Navas v. Eurest Colectividades SA* [2006] ECR 1-6467.

which she had been subject. As a consequence, she sought reinstatement to the position in which she was.

The national court acknowledged that she was fired merely on account of her sickness. At the same time, it found that Spanish law did not recognise illness as protected grounds along with age, disability, gender, or race to void a dismissal.[287] The referring court observed that, according to Spanish case law, there are precedents to the effect that this type of dismissal is classified as unlawful rather than void, because "illness" and "disability" are separated concepts.[288] It is worth noting that under Spanish law, dismissals are regarded as void in cases where they occur in violation of the employee's fundamental rights, such as the right to not be discriminated against on those grounds prohibited by the Constitution or by law.[289] Accordingly, the employee would obtain the right to be reinstated into his previous position. By contrast, dismissals are unlawful when they breach statutory requirements and the employer only has the obligation to compensate the former employee.[290] The Spanish court recognised the necessity to protect the worker in a timely manner under the prohibition of discrimination on grounds of disability, because sickness is often capable of causing an irreversible disability.[291] It correctly argued that "the protection intended by the legislature would, in large measure, be nullified, because it would thus be possible to implement uncontrolled discriminatory practices". [292] In light of this complex background, the Madrid court decided to refer two questions to the CJEU in order to get out of the impasse and in doing so, displayed a degree of sympathy for Ms Chacón Navas' situation.[293]

[287] V. Perju, 'Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States'(2011), 44 *Cornell International Law Journal* 280.
[288] Case *C-13/05 Chacon Navas v Eurest Colectividades SA*, para 21.
[289] Legislative Royal Decree No 1/1995 of 24 March 1995 approving the amended text of the Workers' Statute (Estatuto de los Trabajadores, BOE No 75 of 29 March 1995, p. 9654; 'the Workers' Statute') distinguishes between unlawful dismissal and void dismissal.
[290] *Ibid*, Article 56(1) and (2) of the Workers' Statute.
[291] Case C-13/05 *Chacon Navas v Eurest Colectividades SA*, para 23.
[292] *Ibid*, para 23.
[293] L. Waddington, "Case C-13/05, Chacón Navas v. Eurest Colectividades SA, Judgement of the Grand Chamber of 11 July 2006" (2007) 44 *Common Market Law Review* 487.

4.1.1 *A first controversial approach of the CJEU*

The Court of Justice pronounced an influential judgement on the definition of disability under Directive 2000/78/EC. According to the Court, "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life".[294] In order for the limitation to fall under the category of disability, "it must therefore be probable that it will last for a long time".[295] Thus, the Court set out a distinction between temporary sickness and long-term disability.

The definition elaborated by the EU judges is quite controversial, as it is based on an obsolete and charitable model of disability. The ruling placed strong emphasis on the personal impairments, which would hinder the full participation of persons with disability in professional life rather than discriminatory treatment. This approach moves away from the socio-political model that stresses the need to remove environmental barriers and encourages the inclusion of persons with disabilities within the society.[296] The definition adopted by the CJEU did not take into account the guidance of major EU institutions, which all have highlighted the importance of eliminating the social barriers that persons with disabilities face.[297] For instance, the Council affirmed its commitment to equal opportunities for people with disabilities and to the principle of avoiding or abolishing all forms of negative discrimination based solely on disability.[298] The Commission also emphasised that:

> "Historically, the response to disability has been mainly one of social compensation through charity and the development of specialist caring services outside the mainstream of society. However necessary and well intentioned they might be, such responses have compounded the problem of exclusion and under-

[294] Case C-13/05, *Chacon Navas v Eurest Colectividades SA*, para 43.
[295] *Ibid*, para 45.
[296] E. Flynn, *From Rhetoric to Action Implementing the UN Convention on the Rights of Persons with Disabilities* (Cambridge University Press, 2011).
[297] L. Waddington and A. Lawson, *Disability and non-discrimination law in the European Union*, European Network of Legal Experts in the non-discrimination field (Luxembourg: Publications Office of the European Union, 2009), p. 17.
[298] Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council of 20 December 1996 on equality of opportunity for people with disabilities [Official Journal C 12 of 13.01.1997].

> participation. The traditional approaches are slowly giving way to a stronger emphasis on identifying and removing the various barriers to equal opportunities and full participation in all aspects of life". [299]

The CJEU failed to comply with the new commitments and guidelines of the EU institutions which require to accommodate the legitimate demands for equal rights of persons with disabilities who are not anymore passive recipients of compensation.[300] This decision may be due to poor legal research carried out by the CJEU which did not take into account the new disability strategy embraced by the EU.

Secondly, the Court held that workers are not protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness. The CJEU overlooked the possibility that sickness is often the main cause of an irreversible disability and that workers must be protected in a timely manner under the prohibition of discrimination on grounds of disability. The judges refused the arguments of the Advocate General who proposed to regard those persons who suffer from long-term or permanent diseases as disabled.[301] This decision seems highly vague. It did not distinguish between illnesses that have long-lasting effects and conditions that are not durable.[302] For instance, the UK Equality Act 2010 states that, for the purpose of deciding whether a person is disabled, a long-term effect of the impairment is one which has lasted at least 12 months.[303] It is worth noting that sickness was not regarded by analogy as additional grounds to those in relation to which Directive 2000/78 prohibits discrimination. By doing so, the Court confirmed a closed list of prohibited grounds of discrimination. However, the CJEU recently identified the legal circumstances under which a worker, who is temporarily unable to work, may be considered to have a disability. In

[299] Communication of the Commission of 30 July 1996 on equality of opportunity for people with disabilities: A New European Community Disability Strategy COM (96) 406.
[300] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Equal opportunities for people with disabilities: A European Action Plan /* COM/2003/0650 final.
[301] Case C-13/05, *Chacon Navas v Eurest Colectividades SA*, Opinion of Advocate General, para 85.
[302] L. Waddington, "Case C-13/05, Chacón Navas v. Eurest Colectividades SA, Judgement of the Grand Chamber of 11 July 2006" (2007) 44 *Common Market Law Review*, p. 493.
[303] UK Equality Act 2010, Schedule 1, Para 2.

the case of *Daouidi*, the CJEU overcame the main gaps of *Chacon Navas* and positively provided specific guidelines to determine the extent to which a long-term limitation amounts to disability.[304]

Lastly, the CJEU gave an interesting interpretation of Article 5 of the Directive, which sets out the duty to provide 'reasonable accommodation for disabled persons'. In line with the above provision, the Court held that "dismissal on grounds of disability is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post".[305] This interpretation is very significant, because it reinforces the obligation of the employer to take appropriate measures in order to enable a person with a disability to have access to, participate in, or advance in employment. Hence, this obligation implies that employers cannot dismiss workers where they could perform their duties if a reasonable accommodation is provided.

4.1.2 *Chacón Navas: a missed opportunity*

The case of *Chacón Navas* represents the first decision of the CJEU dealing with the definition of disability under the Framework Directive. The Court was called upon to define the personal scope of the Directive and interpret the disability provisions concerning reasonable accommodation. The Court's approach raises several issues as it highlights a controversial "medical model" of disability in conflict with the developments occurred at EU and international level. It focuses on the individual's impairments, and not on the failure of society to take into account such limitations. However, the main shortcoming of the judgement is that sickness itself is not enough to trigger the protection under the prohibition of discrimination on grounds of disability. The Court did not consider the possibility to include those illnesses which are characterised by long-term or permanent limitation within the Directive's scope. By contrast, the CJEU was correct in interpreting the duty to provide reasonable accommodation in compliance with the Directive and therefore in precluding dismissals on grounds of disability. In light of the above, one may argue that the Court established a narrow definition of

[304] CJEU, C-395/15 *Daouidi*, Judgment of the Court of 1 December 2016.
[305] Case C-13/05, *Chacon Navas v Eurest Colectividades SA*, para 52.

disability and missed the opportunity to enhance the legal protection of the Directive. The main positive consequences one may derive from the Court's interpretation of the concept of disability will now be offered.

4.2 An intriguing evolution: the case of *"Ring and Skouboe Werge"*

The ratification of the UN Convention on the Rights of Persons with Disabilities by the EU has positively influenced the judicial application and interpretation of EU equality law.[306] In the case of *Ring and Skouboe Werge*, the Court of Justice adopted a revolutionary judgement according to which:

> "the concept of disability must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one". [307]

The understanding symbolises a turning point in EU anti-discrimination law, because it expressly embraces the innovative contents of the CRPD and extends the concept of disability. Moreover, the CJEU stressed that the "primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements".[308] In doing so, the Court rightly acknowledged the EU's commitment to adopt and implement a cohesive policy in line with the international provisions of the CRPD.

[306] On 23 December 2010, the European Union (EU) ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD).
[307] Joined Cases C-335/11 and C-337/11, HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) v HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (C-337/11), ECLI:EU:C:2013:222, para. 47.
[308] *Ibid*, para 29.

4.2.1 *Facts and questions*

This preliminary ruling case took place after an action was brought by two applicants, Ms Ring and Ms Werge, before Danish Court. The issue regarded a national law permitting the dismissal of employees with only one month's notice in cases where they had been on sick leave for a period of 120 days over a 12-month period (Paragraph 5(2) of the Law on the legal relationship between employers and salaried employees, hereafter 'FL').[309] The applicants claimed that they had a disability and they had been subject to unlawful discriminatory treatments. Ms Ring was employed by DAB and was absent from work on several occasions from 6 June 2005 to 24 November 2005. The medical certificates stated that she was suffering from constant lumbar pain, but it did not predict the return date to full-time employment.[310] On 24 November 2005, she received a dismissal letter. Similarly, Ms Skouboe Werge, an employee of Pro Display, was the victim of a road accident on 19 December 2003 and started to suffer from whiplash injuries. From that moment, she went first on part-time sick leave for four weeks and then on full-time sick leave. The Danish National Office for Accidents at Work and Occupational Diseases quantified Ms Skouboe Werge's degree of invalidity at 10% and her loss of working capacity at 65%. She was also dismissed with only one month's notice.

The trade union HK, acting on behalf of the two applicants, brought proceedings against their employers in the Maritime and Commercial Court (Sø‑og Handelsret), seeking compensation on the basis of the Anti-Discrimination Law. HK claimed that both employees were suffering from a disability and that their employers had the duty to offer them reduced working hours, by virtue of the

[309] Paragraph 5(2) of the Law on the legal relationship between employers and salaried employees (Lov om retsforholdet mellem arbejdsgivere og funktionærer, 'the FL') provides: "However, it may be stipulated by written agreement in the individual employment relationship that the employee may be dismissed with one month's notice to expire at the end of a month, if the employee has received his salary during periods of illness for a total period of 120 days during any period of 12 consecutive months. The validity of the notice shall be dependent on it being given immediately on the expiry of the 120 days of illness and while the employee is still ill, but its validity shall not be affected by the employee's return to work after the notice of dismissal has been given".
See also, L. Waddington 'Fine-tuning non-discrimination law: Exceptions and justifications allowing for different treatment on the ground of disability' (2014) 15 *International Journal of Discrimination and the Law* 11.
[310] Joined Cases C-335/11 and C-337/11, *Ring and Skouboe Werge*, para 15.

obligation to provide accommodation pursuant to Article 5 of Directive 2000/78.[311] HK also argued that Paragraph 5(2) of the FL could not apply to those two applicants, because their absences were caused by their disability. The employers however submitted that the applicant's state of health was not covered by the concept of 'disability' within the definition of Directive 2000/78, because the illness affected only their full-time working capacity. According to this stance, the applicants could not fall within the definition of disability elaborated during the *Chacón Navas* case, because they were able to work part-time and consequently they were not completely excluded from professional life.[312] In addition, the employers held that, in cases of absence on grounds of illness caused by a disability, the dismissal of a worker with a disability pursuant to Paragraph 5(2) of the FL does not constitute discrimination, and is therefore not contrary to the Framework Directive.

Against this controversial backdrop, the Danish Court referred several questions to the CJEU in order to obtain a clarification of the concept of disability. The national court also asked whether a reduction in working hours can amount to a measure covered by Article 5 of Directive 2000/78. Lastly, the Court was called upon to decide if the Directive precluded the application of a provision of national law under which an employer is entitled to dismiss an employee with a shortened notice period, where "the absence is caused by the disability" or where "the absence is due to the fact that the employer has not implemented the measures appropriate in the specific situation to enable a person with a disability to perform his work".[313]

4.2.2 *Defining disability and the personal scope of the Directive*

The first relevant point of this judgement affects the definition of disability under EU law. Interestingly, for the first time, the CJEU strongly adhered to the concept of disability enshrined in the UN Convention, focusing on those barriers that may hinder the full and effective participation of

[311] *Ibid*, para 23.
[312] P. McTigue, 'From Navas to Kaltoft: The European Court of Justice's evolving Definition of Disability and the Implications for HIV-Positive Individuals' (2015) 15 *International Journal of Discrimination and the Law* 1.
[313] Joined Cases C-335/11 and C-337/11, *Ring and Skouboe Werge*, para 26 (4).

the person concerned in professional life on an equal basis with other workers. The CRPD indeed rejects the medical model and lays down that "disability is an evolving concept that results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others". [314]

As noted above, the ruling of the European Court of Justice acknowledged the legal supremacy of the UN CRPD over European law. As a preliminary point, the Court emphasised Article 216(2) of the TFEU[315] and observed that international agreements concluded by the European Union are binding on its institutions, and consequently prevail over acts of the European Union.[316] The Court therefore interpreted the missing concept of disability under the Directive in compliance with the international guidelines of the CRPD.

Moreover, the CJEU stated that disability does not require complete impossibility to work, but does imply a hindrance to the exercise of a professional activity. The Court refused the argument of the employers according to which disability necessarily implies complete exclusion from work, because it would be incompatible with the purpose of Directive 2000/78, which aims to enable a person with a disability to have access to or participate in employment. It may be argued that the Court embraced a flexible concept of disability that results from the combination of individual impairments and social barriers. In doing so, the Court correctly interpreted and enlarged the personal scope of Directive 2000/78 by covering not only disabilities that are congenital or derive from accidents, but also those disabilities caused by curable or incurable illness.

[314] Preamble of the Convention on the Rights of Persons with Disabilities (adopted by the General Assembly, 24 January 2007), a/res/61/106.
[315] TFEU, Art 216, para 2: "The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope".
[316] Joined Cases C-335/11 and C-337/11, *Ring and Skouboe Werge*, para 28.

4.2.3 *Reasonable accommodation as adaptation of working hours?*

The second crucial issue of the preliminary ruling regards the possibility to include "a reduction in working hours" within the accommodation measures required by the Directive. The Courts noted that neither Article 5 of Directive 2000/78 nor recital 20 in its preamble mention reduced working hours. The recital only mentions the concept of 'patterns of working time'. The employers argued that the latter category only refers to such matters as the organisation of the patterns and rhythms of work in connection with the production process.

The Court extended the concept of 'patterns of working time' to such adaptations of working hours that accommodate the peculiar needs of persons with a disability who are not capable, or no longer capable, of working full-time to work part-time. The duty to provide reasonable accommodation envisages not only material but also organisational measures. The term 'pattern' of working time therefore may include the rhythm or speed at which the work is done. The CJEU did not find any relevant fact to justify the exclusion of Ms Ring from occupying a part-time post. Indeed, after her dismissal, Ms Ring started a new part-time job as a receptionist with another company. The Court underlined that Danish law promotes public assistance to undertake accommodation measures whose purpose is to facilitate the access to the labour market of persons with disabilities, including initiatives aimed at encouraging employers to recruit and maintain in employment persons with disabilities. In the light of the foregoing, the Court held that a reduction in working hours may constitute one of the accommodation measures under Article 5 of Directive 2000/78.

This part of the judgement is remarkable as it clarifies the legal content of the duty to take appropriate measures according to the provision of reasonable accommodation. The definition of appropriate measures under recital 20 of the Directive is not exhaustive and leaves a wide margin of appreciation to Member States in determining the appropriateness of such measures. Recital 20 generically states that "appropriate measures should be provided, i.e. effective and practical measures to adapt the

workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources". The conclusions of the Court contributed to enlarge the protection afforded by the Directive and strengthen the rights of persons with disabilities in the workplace. The CJEU expressly interpreted recital 20 and Article 5 of Directive 2000/78 in line with the second paragraph of Article 2 of the CRPD which establishes the duty to provide 'reasonable accommodation'. The Court should therefore be commended for clarifying the concept of reasonable accommodation under EU law and highlighting that it "must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers".[317]

4.2.4 *Addressing indirect discrimination: legitimate aim, necessity and proportionality*

The CJEU was also called upon to decide the compatibility of national legislation with EU law where an employer is allowed to terminate an employment contract with a reduced period of notice if the disabled worker has been absent because of illness for 120 days during the previous 12 months, where those absences are the consequence of the employer's failure to take the appropriate measures. In this regard, the CJEU set out that whether the absence of the workers is attributable to the employer's failure to adopt appropriate accommodation measures, such national legislation should be in conflict with Directive 2000/78. [318]

In addition, the referring court asked if the Directive precludes national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker has been absent because of illness, where the absence is caused by his disability. The Court noted that Paragraph 5(2) of the FL, which relates to absences on grounds of illness, applies in the same way to disabled and non-disabled persons who have been absent for more than 120 days on

[317] *Ring and Skouboe Werge*, para 54.
[318] *Ibid*, para 66 and 67.

those grounds. As a consequence, this provision does not bring about difference of treatment based *directly* on disability, within the meaning of Article 1 in conjunction with Article 2(2)(a) of Directive.

The Court correctly argued that a person with a disability "is more exposed to the risk of application of the shortened notice period laid down in Paragraph 5(2) of the FL than a worker without a disability".[319] The CJEU explicitly referred to the observations of the Advocate General, according to which a worker with a disability runs the additional risk of an illness connected with his disability. This circumstance implies that the worker is more exposed to the risk of accumulating days of absence on grounds of illness, and therefore of reaching the 120-day limit. It may be said that the 120-day rule is more likely to place workers with disabilities at a disadvantage than workers without disabilities. Thus, it establishes a difference of treatment indirectly based on disability under the meaning of Article 2(2)(b) of Directive 2000/78.

In this case, the CJEU examined whether that difference of treatment is objectively justified by a legitimate aim and whether the means of achieving that aim are appropriate and necessary. The Danish government submitted that Paragraph 5(2) of the FL aims to encourage employers to recruit and maintain workers who often are absent because of illness. The latter measure would allow employers to dismiss workers with a shortened period of notice, where the absences are too long. At the same time, those workers can retain their employment during the period of illness. The Danish government argued that the provision is adopted in the interests both of employers and employees. The government underscored the general regulation and functioning of the Danish labour market, which promotes not only the flexibility and freedom of contracts, but also the protection of workers. In line with the government's considerations, DAB and Pro Display observed that the 120-day rule is intended to protect those workers who are sick for long periods of time, because employers who agree to apply it are inclined to wait longer before dismissing a worker.

[319] *Ibid*, para 76.

The CJEU remarked that the promotion of recruitment represents a legitimate aim of the social or employment policy of the Member States. Theoretically speaking, such aims may be regarded as objectively justifying a difference of treatment on grounds of disability. Nonetheless, the Court clarified that it is for the referring court to assess whether the means used by the Danish employers to realise those aims can be considered as appropriate and necessary. In this respect, such assessment must take into account the additional risks faced by disabled persons, who generally encounter several obstacles in re-entering the labour market compared to persons without disabilities. The Court placed great emphasis on the importance of accommodating the specific needs of persons with disabilities. By doing so, it laid down that Directive 2000/78 precludes "national legislation under which an employer can terminate the employment contract with a reduced period of notice (…), where those absences are the consequence of his disability, unless that legislation, as well as pursuing a legitimate aim, does not go beyond what is necessary to achieve that aim, that being for the referring court to assess". [320]

In addressing crucial issues such as legitimate aim, necessity and proportionality, the Court had to counterweight delicate and competing (private and public) interests: the legitimate aim of the Danish government to promote recruitment in the labour market and the opposing interest of workers with disabilities not to be discriminated against. In this respect, the CJEU established a fundamental criterion to assess whether a provision goes beyond what is necessary to achieve the aims pursued. The provision must be "placed in its context and the adverse effects it is liable to cause for the persons concerned must be considered".[321] This approach seems highly valuable as it takes into account the relevant factors that hamper the professional life of persons with disabilities. To the same extent, it leaves a wide margin of appreciation to national courts in determining the concrete risks run by

[320] *Ring and Skouboe Werge, Ibid*, para 92.
[321] *Ibid*, para. 89.

disabled persons in re-entering the labour market. A brief overview of the main findings of the judgement in *Ring and Skouboe Werge* will now be given.

4.2.5 *A significant development for EU equality law*

The judgement in *Ring and Skouboe Werge* can be viewed as the most important step forward in the protection of persons with disabilities in the EU legal framework. This case is the first disability discrimination-related preliminary reference following the conclusion of the CRPD by the EU. It represents a unique opportunity for mainstreaming disability rights, as it places the CRPD at the centre of EU law. The Court not only pointed out that the UN Convention forms 'an integral part of the European Union legal order', but also that the Framework Equality Directive must be interpreted in a manner consistent with such international instrument. This decision may accelerate the process of revising and updating EU equality legislation by expressly referring to the primacy of international agreements over instruments of EU secondary law. The CRPD's ratification indeed implies that the EU has the legal obligation to adopt all appropriate legislative, administrative and other measures for the implementation of the rights of persons with disabilities. Importantly, this judgement addresses different complex issues such as the personal scope of the Directive, the meaning of indirect discrimination, and the legal content of the duty to provide reasonable accommodation in the workplace.

In primis, the Court strongly adhered to the social model of disability embodied in the UN Convention, focusing on those external barriers which may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. The CJEU overcame those shortcomings that characterise the definition of disability developed in the case of *Chacón Navas*. In particular, the Court clarified the status of persons who are sick under Directive 2000/78. In doing so, it filled the legal gap left by the *Chacón Navas* judgement which merely held that sickness could not be added to the list of grounds covered by the Directive. The Court adopted a broad

approach according to which individuals can be protected as long as their condition led to the required degree of impairment. The impairment must be on a 'long-term' basis as established by Article 1 CRPD. In addition, the Court enlarged the Directive's personal scope by stressing that a disability does 'not necessarily imply complete exclusion from work or professional life'. This interpretation properly purses the Directive's objective to foster a labour market favourable to social integration that aims at combating discrimination against groups such as persons with disability. Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly towards the full participation of citizens in economic, cultural and social life and to realising their potential.[322] The 'hindrance' to exercise professional life does not require the full 'impossibility' to carry out professional activities. Such interpretation positively allows persons with disabilities who are only able to work part-time to fall under the protection of the Directive. In other words, the Court definitively abandoned the medical paradigm of disability and laid the foundations to build a new comprehensive legal framework in compliance with international law.

The Court also considered the compatibility with the Directive of Danish legislation allowing for a shortened period of notice. It observed that such law applies to the same extent to disabled and non-disabled persons who have been absent for more than 120 days on the grounds of illness. The Court acknowledged the existence of an indirect discrimination, because a neutral provision puts persons having a disability at a particular disadvantage compared to other persons without disability. The prohibition of indirect discrimination has been rightly applied to cover workers with disabilities who are more likely to accumulate days of absence on grounds of illness. In more general terms, this provision has the effect to protect those individuals who face greater difficulties and barriers in the workplace. The recognition of indirect discrimination as a form of discrimination reflects a more substantive approach to the concept of equality and enhances the protection of vulnerable categories

[322] Preamble of Directive 2000/78/EC.

of individuals.[323] It should be observed, moreover, that the Court applied the justification test to examine whether the difference of treatment was justified by a legitimate aim. To this end, it sought to balance public and private interests. It held that the 120-day rule "must be placed in its context and the adverse effects it is liable to cause for the persons concerned must be considered".

The CJEU's reasoning significantly considered the relevant factors that affect the professional life of workers with disabilities. However, it overlooked the impact of such an interpretation on the freedom of the Danish government to regulate its labour market. In this respect, the Danish 'flexicurity' model combines flexibility and security. It is based on flexible hiring and firing rules, considerable social safety net and active labour market policies.[324] The Court's interpretation may therefore constitute a burdensome obligation for Member States adopting flexible labour market regulations.[325] The CJEU instructed the Danish court to 'take account of relevant factors relating in particular to workers with disabilities' (para. 90), noting that such workers often find it difficult to re-enter the workforce following dismissal and have 'specific needs in connection with the protection their condition requires' (para. 91).[326] This additional protection requirement may narrow the freedom of employers to organise and manage their workforce.

The last interesting question faced by the Court concerned the interpretation of Article 5 of Directive 2000/78 that creates the obligation for employers to provide reasonable accommodation. As noted in the first chapter, this duty constitutes the main non-discrimination obligation in the CRPD's context. The duty to provide reasonable accommodation contributes to an effective achievement of substantive equality in the workplace through the imposition of positive obligations on employers. Indeed, it

[323] L. Waddington and A. Hendriks, The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination (2002) 18 *The International Journal of Comparative Labour Law and Industrial Relations* 403.
[324] J. D. Schmidt and J. Hers, "The Past has No Future: Revisiting Danish Flexicurity" in *Globalization and Labour Market Dynamics* (2015, Sage Publications).
[325] M. Ventegodt Liisberg, 'Flexicurity and Employment of Persons with Disability in Europe in a Contemporary Disability Human Rights Perspective', in Lisa Waddington et al. (eds.), *European Yearbook of Disability Law*, Volume 4 (Intersentia, 2013).
[326] The European Network of Legal Experts in the non-discrimination field, *European Anti-Discrimination Law Review* (European Commission, November 2013).

entails the responsibility of public and private actors to ensure persons with disabilities the enjoyment or exercise of all human rights on an equal basis with others. [327] In this case, the CJEU explicitly stated that the CRPD's provision prescribes a broad definition of 'reasonable accommodation' and found that the adaptation of working hours accommodates the specific needs of persons with disabilities who are not capable, or no longer capable, of working full-time. This understanding may be considered as highly relevant because it takes into account those organisational measures that do not constitute a disproportionate burden on employers. Moreover, when the failure of the employer to provide reasonable accommodation is the main cause of the employee's absence from work, the national legislation under which an employer can terminate the employment contract with a reduced period of notice breaches the purpose of Directive 2000/78/EC. The link between the employer's failure to act and the employee's absence from work is a necessary condition to prove the violation of the obligation to provide reasonable accommodation. In doing so, the Court introduced an anticipatory element to the obligation to act upon the employer in order to prevent further absences of a worker with disabilities. This interpretation seems to go even beyond the CRPD's legal content as it embraces an extensive definition of reasonable accommodation which entails anticipatory duties upon employers. By contrast, the CRPD does not enshrine an anticipatory obligation to accommodate persons with disabilities, but it requires State Parties to take all appropriate steps to ensure that reasonable accommodation is provided for persons with disabilities in order to promote equality and eliminate discrimination (Art. 5.3). The findings of the Court mirror and reinforce the paradigm of substantive equality introduced by the CRPD. The Directive's interpretation is not only in line with the developments of international human rights law, but recognises also effective and affirmative obligations under EU law. The most recent ruling handed down by the CJEU with regard to the concept of disability under the Framework Directive will now be examined.

[327] J. E. Lord and R. Brown, 'The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities' in M.H. Rioux, L.A. Basser and M. Jones (eds), *Critical Perspectives on Human Rights and Disability Policy* (Martinus Nijhoff, The Hague, 2011).

4.3 The case of *Kaltoft v Municipality of Billund*

The recent case of *Fag og arbejde (FOA) v Kommunernes landsforening (Kl)*[328] represents a crucial and controversial step of the process concerning the jurisprudential interpretation of the Equality Framework Directive's personal scope.

The main dispute regards Mr Kaltoft, hired as a childminder by the Municipality of Billund, one of the Danish public administrative authorities. During his work period, he was obese according to the definition of the World Health Organisation (WHO). Kaltoft attempted to lose weight with the support of the health programme provided by the Municipality of Billund. After a leave of one year, due to family reasons, he resumed his work as a childminder. Thereafter, he started to receive several unexpected visits from the head of the childminders with the purpose of monitoring his weight loss. During those visits, the head of the childminders pointed out that Mr Kaltoft's weight had remained unchanged. [329] The education inspectors of the Municipality of Billund were requested to dismiss a childminder and the head of the childminders decided to nominate Mr Kaltoft. The Municipality of Billund formally notified Mr Kaltoft of its intention to dismiss him "following a specific assessment on the basis of a decline in the number of children, thus that of the workload, having severe financial implications on the childminding service and on its organization".[330] However, he claimed to be the only childminder dismissed because of the alleged decline in workload and expressed the opinion that his dismissal was induced by his obesity.

The workers' union Fag og Arbejde (FOA), acting on behalf of Mr Kaltoft, brought an action before the District Court of Kolding claiming that Mr Kaltoft had been discriminated against on grounds of obesity. In this context, the Danish Court referred a question for a preliminary ruling to the CJEU with the purpose of asking whether obesity can be deemed a disability covered by the Directive

[328] Case C-354/13 *Fag og arbejde (FOA) v Kommunernes landsforening (kl*), ECLI: EU: C: 2014:2463.
[329] *Ibid*, para 20.
[330] *Ibid*, para 25.

2000/78/EC. Moreover, it asked which criteria would be decisive to assess whether a person's obesity falls under the protection of the prohibition of discrimination. The CJEU was also requested to decide if discrimination on grounds of obesity in the labour market is contrary to EU law, as expressed in Article 6 TEU concerning fundamental rights.

4.3.1 *The prohibition of discrimination on grounds of obesity*

The Court properly highlighted that EU law does not provide for any prohibition on grounds of obesity as such. In particular, neither Article 10 TFEU nor Article 19 TFEU make any reference to obesity. At the same time, neither EU secondary legislation nor Directive 2000/78/EC set out a general principle of non-discrimination on grounds of obesity as regards employment and occupation. The Court pointed out that only the general principle of non-discrimination, which is also enshrined in the Charter of Fundamental Rights, is binding for Member States where the national situation at issue falls under the scope of EU law. The principle of non-discrimination indeed represents one of the fundamental rights which form an integral part of the general principles of EU law.

In light of this legal backdrop, the CJEU decided not to operate any extension by analogy of the Directive's scope beyond the listed grounds. It held that EU law must be interpreted as not laying down a general principle of non-discrimination on grounds of obesity as such with regards to employment and occupation.[331] This interpretation seems to rely on the fact that only Article 21 of the Charter includes an open-ended prohibition of discrimination which could potentially cover obesity as a stand-alone ground. Thus, Article 6(1) TEU precludes recourse to the Charter to extend '*in any way'* the competences of the European Union as defined in the Treaties. Similarly, Article 51(2) of the Charter states that it "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks

[331] *Ibid*, para 40.

as defined in the Treaties". These provisions, according to the A-G Jaaskinen, lay down an outer-boundary of EU fundamental rights law that is pertinent to the present case.[332]

4.3.2 *The prohibition of discrimination in the labour market: the CJEU's minimalist approach*

The *Kaltoft* judgement is particularly silent with respect to the nature of the principle of non-discrimination in the labour market. The Court concluded that the situation, in so far as it relates to a dismissal purportedly based on obesity, does not fall within the scope of EU law. In that context, the provisions of the Charter of Fundamental Rights of the European Union are likewise inapplicable in such a situation. The Court implicitly embraced the Advocate General's arguments according to which the general principle of EU law precluding discrimination on grounds of age, which is reflected in Article 21(1) of the EU Charter, and which can, in some circumstances, have horizontal direct effects on two private parties, could not be applied in this case. He argued that "there is nothing in the relevant age-discrimination rulings pointing toward the existence of a general principle of law precluding discrimination in the labour market generally". Nor can constitutional provisions common to a handful of Member States, or a protocol to the ECHR, such as Protocol 12 to the ECHR establish a general principle of law which would oblige Member States to combat discrimination on grounds which, unlike age, are not spelled out in the Treaties or in EU legislation.[333] The General Advocate recalled Article 51(1) of the EU Charter that only binds the Member States when they are 'implementing' EU law. He considered the fact that discrimination occurred in a substantive field such as the labour market "as an insufficient foundation for concluding that a Member State is implementing EU law". [334] In case of the objective of the main proceedings is not related to the interpretation or application of a rule of EU law, the requisite link should be regarded insufficient.

[332] Opinion of Advocate General Jääskinen delivered on 17 July 2014 Case C-354/13 FOA, acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund, paragraph 19.
[333] *Ibid*, para. 26
[334] *Ibid*, para. 20.

However, the CJEU avoided deciding whether the principle of non-discrimination in the labour market, as either a Charter right or a general principle as expressed by Directive 2000/78, may be invoked in proceedings between private parties. Moreover, the CJEU did not clarify the criteria to assess the 'link' between a provision of Member State law and the substantive scope of an equally specific provision of EU law. By contrast, the Court purely handed down that dismissals based on obesity fall outside the scope of EU law and therefore the provisions of the Charter are inapplicable in such a context. In doing so, the Court confirmed the emergence of "judicial minimalism" in preliminary references cases.[335] This approach does not help identify the nature and the horizontal effects of the Charter's provisions in national civil proceedings between private parties, in particular with regard to the prohibition of discrimination.

4.3.3 *Is obesity a disability under the Framework Directive?*

The CJEU first dealt with the issue of admissibility. The Danish government observed that the referring question concerning the possibility to consider the obesity of a worker as a 'disability' was inadmissible. It argued that the facts did not exhibit the inability of Mr Kaltoft to carry out his functions during the period in which the Municipality of Billund employed him. In addition, the government held that the answer could be clearly deduced from the existing case law of the CJEU and the referring court could itself give a ruling in the main proceedings on the definition of 'disability' within the meaning of Directive 2000/78.[336] The Court regarded the question as admissible because, according to Article 267 TFEU, it is solely for the national court before which the dispute has been brought, to determine both the need for a preliminary ruling and the relevance of the questions which it submits to the Court under Article 267 TFEU.

[335] L. Pech, Between judicial minimalism and avoidance: the court of justice's sidestepping of fundamental constitutional issues in Römer and Dominguez (2012) 49 *Common Market Law Review* 1841.
[336] Case C-354/13 *Fag og arbejde (foa) v Kommunernes landsforening (kl*), para. 44.

The Court then turned to examine the matter of the preliminary reference. Its analysis began with the explanation of the concept of 'disability', which includes not only the impossibility of exercising a professional activity, but also the hindrance to exercise such an activity. The Court clarified that the complete inability of the worker to carry out his professional tasks does not constitute a compulsory condition to apply the Directive's provisions. On the contrary, it is sufficient to assess the hindrance to the exercise of a professional activity to trigger the protection of EU law. Indeed, the main purpose of the Directive is to enable a person with a disability to have access to or participate in employment. Interestingly, the Court also asserted that the concept "does not depend on the extent to which the person may or may not have contributed to the onset of his disability".[337]

The Court mentioned the legal contents of the CRPD outlining the definition of disability previously adopted in the case of *Ring and Skouboe Werge*. It concluded that obesity may be a disability if it entails a limitation resulting from an impairment which hinders equal participation in the workplace. It is worth noting that the CJEU identified three main criteria to fall under the Directive's protection: the existence of a personal and long-term limitation, the interaction between a person with impairments and the environmental barriers, and the hindrance to fully exercise professional life. In accordance with the above considerations, the Court stated that:

> "in the event that, under given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of 'disability' within the meaning of Directive 2000/78/EC".[338]

At first glance, this understanding of the concept of disability may be considered as a proper implementation of the social model adopted by the CPRD. However, the judgement tends to

[337] *Ibid*, para 56.
[338] *Ibid*, para 59.

emphasise the physical constraints of the claimant as a test to assess whether he fell within the Directive's personal scope. Paragraph 60 of the judgement stated that disability falls under the meaning of Directive 2000/78 "if the obesity of the worker hindered his full and effective participation in professional life on an equal basis with other workers *on account of reduced mobility or the onset, in that person, of medical conditions* preventing him from carrying out his work or causing discomfort when carrying out his professional activity". It is unclear from the judgement whether attitudinal and external barriers would have been sufficient to establish the existence of a disability in this case. As a result, *Kaltoft* does not make a true break with the medical model of disability as it excessively focuses the analysis on those physical impairments of the individual.

4.3.4 *Should obesity be considered a disability?*

In *Kaltoft*, the Court did not consider obesity per se as a disability, unless it results in a limitation that hinders equal participation in employment. This judgement refused the 'fat right' claim according to which obesity should be regarded per se a prohibited ground of discrimination or should be expressly included under the concept of disability.[339] The Court's approach has been considered 'cautious' because it left the national court to decide whether obesity constituted a disability.[340] The Court's reluctance to expressly define obesity as a disability has also been ascribed to the consequences that could have affected the labour market and the costs imposed on Member States.[341]

It may be said that the inclusion of obesity per se under the concept of disability is not required neither by Directive 2000/78 nor the CRPD's provisions. There is no evidence in Directive 2000/78 to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness. By contrast, it is established in the case law that only when

[339] D. L. Hosking, Fat rights claim rebuffed: Kaltoft v Municipality of Billund (2015) *Industrial Law Journal* 460.
[340] See for instance, S. Favalli and D. Ferri, Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints (2016) 22 *European Public Law* 541.
M. Butler, Obesity As A Disability: The Implications Or Non-Implications Of *Kaltoft* (2014) 20(3) *Web Journal of Current Legal Issues*.
[341] *Ibid.*

a ‘curable or incurable illness’ entails a ‘long-term’ limitation, can it be covered by the concept of ‘disability’ within the meaning of Directive 2000/78. In this regard, obesity does not always constitute a long-term limitation or represent a limitation that hinders the person’s *full and effective participation* in professional life *on an equal basis* with other workers. As a consequence, automatically classifying obesity as a disability would be highly simplistic and would fall outside the scope of Directive 2000/78. To the same extent, the CRPD sets out that disability is an ‘evolving’ concept that demands the coexistence of a long-term physical, mental, intellectual or sensory impairment with the hindrance to fully participate in society. It seems that the Convention adopts a flexible and dynamic concept of disability which demands a case-by-case assessment of those situations falling under this wide notion.

The CJEU’s legal reasoning however still highlights some aspects of an outdated medical model of disability that merely identifies disability as a medical condition located within the individual. A final evaluation of the work carried out by the CJEU and an overview of the main findings of this research will now be offered.

4.4 Is the CJEU still a real promoter of disability rights?

The judgement, in the case of *Kaltoft v Municipality of Billund*, symbolises a contradictory approach of the CJEU with regard to the personal scope of the Framework Directive. EU law does not consider obesity as a self-standing ground of discrimination and the CJEU concluded that the existence of discrimination on grounds of obesity must be assessed on a case-by-case basis. The main flaw of this reasoning is the reference to a concept of disability which does not fully embrace the CRPD’s social model. This is a negative development in comparison with the interpretation adopted in *Ring and Skouboe Werge* when the CJEU expressly aligned the EU concept of disability to the new paradigm embraced by the CRPD. It appears that the initial CJEU’s judicial activism is gradually converting in a sort of judicial “prudence” when addressing sensitive issues that may significantly impact the labour

market. The uncertain position in relation to the prohibition of discrimination in the labour market and the return to a medical model of disability reveal the CJEU's cautious approach that restricts the substantive content of EU equality law and avoids clarifying the legal (and economic) implications for Member States.

By contrast, the CJEU considered the prohibition of indirect discrimination and the duty to provide reasonable accommodation as essential provisions for tackling disability discrimination in the workplace. Indeed, in *Ring and Skouboe Werge*, the notion of reasonable accommodation has been extensively interpreted as including adaptions of working hours and *anticipatory* duties upon employers. The Court drew attention to the importance of eliminating the barriers that hamper the effective participation of persons with disabilities in professional life on an equal basis with other workers. The CJEU also stated that apparently neutral provisions may place workers with disabilities at a particular disadvantage compared to workers without disabilities. These provisions may therefore bring about indirect discrimination under the meaning of Article 2(2)(b) of Directive 2000/78. This interpretation is consistent with the UN Convention which has strongly influenced the judicial interpretation of EU secondary law and consolidated the rights of persons with disabilities in EU cases-law.

Against this background, the CJEU has certainly performed a crucial role in implementing the rights of persons with disabilities in the EU legal framework. More generally speaking, the last rulings of the CJEU show meaningful and positive effects of the Framework Directive on the rights of persons with disabilities. However, a more coherent judicial approach is required in relation to the legal understanding of the concept of disability. An overarching understanding of disability that takes into account the guidelines of the CRPD and clarifies the ambiguous CJEU's jurisprudence would be needed under EU law. To do so, the EU should put in place a comprehensive legal framework to reinforce the social model of disability and the prohibition of discrimination in the labour market.

The judicial approach of the CJEU with regard to the concept of disability and the necessary requirements to assess the 'long-term' nature of the impairment will now briefly be examined.

4.5 The case of *Daoudi:* clarifying the long-term nature of the impairment

The case of *Daoudi* also illustrates the CJEU's judicial interpretation of the personal scope of the Framework Equality Directive.[342] Mr. Daoudi worked as a kitchen assistant and dislocated his left elbow after slipping on the kitchen floor of the restaurant in which he worked. As a result, he initiated the procedure to have his temporary incapacity for work recognised. He could not return to work immediately and while he was still temporarily unable to work, Mr. Daoudi received a notice of disciplinary dismissal. He submitted that the dismissal was discriminatory and that, in particular, he was covered by the concept of 'disability', within the meaning of Directive 2000/78. The Spanish court was therefore called to decide whether his impairment could be classified as 'long-term' in order to apply the disability legislation. However, the Spanish court referred the case to the CJEU and asked whether Mr. Daoudi would fall under the concept of disability of the Framework Equality Directive, given the uncertain duration of his injury.

The Court positively recognised that the CRPD may be relied on to interpret Directive 2000/78, which must, as far as possible, be interpreted in a consistent manner with the UN Convention's provisions. The Court clarified that the Framework Equality Directive also covers those disabilities caused by an accident. Therefore, if an accident entails a limitation resulting in particular from long-term physical, mental or psychological impairments which, in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and if that limitation is long-term, it may come within the concept of 'disability' within the meaning of Directive 2000/78.[343] However, the CPRD does not define 'long-term' as regards a

[342] Case C-395/15, *Daoudi v Bootes Plus SL and Others*, Judgement of December 2016.
[343] *Ibid*, para. 45.

physical, mental, intellectual or sensory impairment. To the same extent, the Directive 2000/78 lacks to identify the concept of a 'long-term' limitation of a person's capacity for the purposes of the concept of disability.

Against this background, the CJEU provided specific guidelines to assess the 'long-term nature' of the impairment which have to be taken into account by the national court to assess the concept of disability under the Framework Equality Directive. It pointed out that the 'long-term' nature of the limitation must be assessed in relation to the condition of incapacity of the individual concerned at the time of the alleged discriminatory act adopted against him/her. The evidence of a 'long-term' limitation should include the fact that the incapacity of the person does not "display a clearly defined prognosis as regards short-term progress" or the fact that it "is likely to be significantly prolonged before that person has recovered".[344] Moreover, in order to verify the 'long-term' nature of the individual limitation, national courts have to consider all the objective evidences relating to that person's condition, in particular documents and certificates, "established on the basis of current medical and scientific knowledge and data".[345] In case the capacity of the person concerned is recognised as 'long-term', it is necessary to demonstrate that an unfavourable treatment on grounds of disability represents discrimination under the meaning of Article 2(1) of the Directive 2000/78.

This judgement may be considered as highly relevant because it helps better define the concept of disability under EU equality law by providing precise guidelines to assess the 'long-term' nature of the individual impairment. The Court indeed emphasises the need to ensure a uniform application of EU law and the principle of equality in light of the objective pursued by the legislation in question. This approach seems to overcome the flaws of the *Chacón Navas'* judgement where the Court did not explain the conditions under which a long-term limitation amounts to disability. In *Chacón Navas*, the Court stated that 'sickness' and 'disability' are different concepts. It defined disability as a

[344] *Ibid*, para. 56.
[345] *Ibid*, para 59.

"limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life".346 However, it did not adopt any specific guidance to verify when a limitation falls within the concept of disability. The Court merely concluded that it must be probable that the impairment will last for a long time. In addition, the Court excluded that "workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness".347 By doing so, it disregarded the possibility to consider, as falling under the concept of disability, a sickness which caused long-term or permanent limitations.

In the case of Daoudi, the CJEU's interpretation concerning the concept of disability still retains a major focus on the (long-term) nature of the medical impairment rather than its interaction with external barriers. Nevertheless, it offers significant guidance to legally identify the long-term nature of the impairment and include under the protection of the Framework Equality Directive a wider category of limitations that, in interaction with various barriers, may hinder the full and effective participation of person with disabilities in professional life.

The analysis will now focus on the CJEU's interpretation of the concept of disability beyond the legal borders of the prohibition of discrimination in the workplace. It will briefly show the extent to which the social model of disability has or has not been absorbed by the EU legal system.

4.6 Defining disability beyond the labour market: the case of *Glatzel*

The case of *Wolfgang Glatzel v. Freistaat Bayern* exhibits the reluctance of the CJEU in embracing the social model of disability.[348] This case concerns the application of Directive 2006/126/EC on driving licences and the definition of disability beyond the employment area in relation to Article 21

[346] Case C-13/05 *Chacon Navas v Eurest Colectividades SA*, 11 July 2006, para. 43.
[347] *Ibid*, para. 44.
[348] Case C-356/12 *Wolfgang Glatzel v. Freistaat Bayern*, Judgement of 2 May 2014.

EU Charter according to which any discrimination based on any ground such as disability shall be prohibited.[349]

Mr Glatzel lost his driving licence on the ground that he had driven under the influence of alcohol. His application for a new driving licence for categories C1 and C1E (heavy goods vehicles) was refused on the ground that he suffered from unilateral amblyopia, involving a substantial functional loss of vision in one eye. He did not meet the requirements of Directive 2006/126 which sets out that drivers of heavy vehicles must have visual capacity of at least 0,1. Following an unsuccessful objection against that decision, Mr Glatzel brought an action before the Verwaltungsgericht Regensburg (Administrative Court, Regensburg). As that court dismissed his action, Mr Glatzel brought an action before the Bayerischer Verwaltungsgerichtshof. The court observed that "there is no ground on which to prohibit persons who have a visual acuity of less than 0,1 in one eye from driving a motor vehicle where, first, they have binocular vision, second, their field of binocular vision satisfies the requirements laid down in point 6.4 of Annex III to Directive 2006/126 and, third, they have learned fully to compensate for their lack of spatial vision".[350]

The court therefore referred to the CJEU for a preliminary ruling concerning the validity of the strict requirements established by Directive 2006/126 in the light of Articles 20, 21(1) and 26 of the Charter concerning equality before the law, non-discrimination on grounds of disability, and the integration of persons with disabilities.

[349] S. Favalli and D. Ferri, Defining Disability in the EU Non-Discrimination Legislation: Judicial Activism and Legislative Restraints (2016) 22 *European Public Law*, p. 19.
[350] *Wolfgang Glatzel v. Freistaat Bayern*, Judgement, paragraph 31.

4.6.1 *The problematic CJEU's assessment*

For the purpose of this research, the case of *Glatzel* is highly relevant as it addresses several important issues such as the legal understanding of disability and the legal value of the CPRD and the EU Charter.

It is worth noting that the CJEU correctly recalled the notion of disability developed in the case of *Ring and Skouboe Werge* that expressly embraces the social model embodied in the CRPD. However, the Court concluded that it "did not have sufficient information to ascertain whether such impairment constitutes a disability within the meaning of Article 21(1) of the Charter". The Court mainly focused its analysis on the nature of the individual impairment and those medical standards required by EU law.[351] In doing so, the external barriers hindering the participation of the person concerned in professional life have been complexly overlooked. This approach reflects the obsolete medical paradigm of disability that has been rejected by the recent developments of international human rights law.

The Court incorrectly disregarded the opinion of the Advocate General who underlined that "from the definition given by the Court and from that given by the United Nations, disability must not be understood according to the *degree of the deficiency at issue*, but must be determined having regard to the *end result occasioned by* that deficiency in a given social context or environment".[352] Accordingly, to assess a disability, the analysis should focus on the final consequences of the deficiency and not on the impairment in itself. A person should be considered having a disability, whether the interplay between the deficiency and the external environment brings about a restriction of the activity of the person concerned, who is prevented from participating in professional life on equal basis with others. The Advocate General's opinion reflects an appropriate understanding of the

[351] C. O'Brien, 'Driving Down Disability Equality?' (2014) 21(4) *Maastricht Journal of European and Comparative Law* 723.
[352] Opinion of Mr Advocate General Bot delivered on 18 July 2013. *Wolfgang Glatzel v Freistaat Bayern*, paragraph 35.

social model of disability and proposes an adequate solution of the case at issue. In *Glatzel*, the interaction between the individual impairment (the amblyopia which affects his vision of the right eye) and those high standards required by Directive 2006/126 to release a category C1 or category C1E driving licence prevents the claimant from fully participating in professional life. This reasoning should have been upheld by the CJEU which instead confirmed a reluctant approach towards the social model of disability.

In this case, the CJEU was called to identify the interaction between the personal deficiency and the disabling rules of the social context. Moreover, it should have found a balance between the individual interest to not be discriminated against on grounds of disability and the collective considerations of safety. The Court merely concentrated its analysis on the claimant's visual impairment and resorted in a simplistic way to the overriding considerations of road safety as an objective justification. This judgement illustrates how the Court is progressively departing from the rights-centred approach enshrined in the CPRD and lowering the protection of EU disability law.

4.6.2 *The role of the CRPD: a confusing approach*

The Court adopted an inconsistent position with regard to the legal value of the CRPD within the EU legal framework. The CJEU stated that the CRPD is an integral part of the EU legal order. Notwithstanding, it specified that the CRPD's provisions are subject, in their implementation or their effects, to the adoption of subsequent acts of the contracting parties. The provisions therefore do not constitute, from the point of view of their content, unconditional and sufficiently precise conditions which allow a review of the validity of the measure of EU law.[353]

This judgement exemplifies the controversial and undefined relation between the CPRD and EU law. The Court denied the possibility to challenge provisions of EU law in the light of the CRPD's obligations and therefore restricted the implementation of Article 216(2) TFEU according to which

[353] *Wolfgang Glatzel v. Freistaat Bayern*, Judgement, paragraph 69.

international agreements concluded by the EU are binding upon the institutions and on its Member States. This approach seems highly contradictory as it acknowledges that the CPRD is part of the EU legal order but in a *partial* and *limited* way. This means that the CRPD does not produce any legal effects per se in the EU system as it requires implementing measures by the Member States.[354] Only those implementing measures should be consistent with the CPRD's provisions which however do not constitute unconditional and sufficiently precise conditions. This reasoning confirms the negative trend in the CJEU's jurisprudence to protect EU norms from the interference of international human rights law. The same approach has been adopted in the case of *Z. v A Government Department and the Board of Management of a Community School.*[355] This case will be analysed further in section 6 of this chapter in order to illustrate and criticise the judicial approach of the CJEU in relation to the CRPD.

4.6.3 *The EU Charter of Fundamental Rights: a narrow interpretation*

Art. 26 of the Charter is a fundamental provision for the protection of persons with disabilities according to which "the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community". The CJEU embraced a narrow interpretation of Art. 26 of the Charter and merely labelled it as a principle.[356] The Court stated that Directive 2006/126 implements the principle contained in Article 26 of the Charter and recognised the applicability of the latter provision to the case in the main proceedings.[357] The CJEU also concluded that the principle enshrined in Article 26 does not require the EU legislature to adopt any specific measure and it must

[354] C. O'Brien, 'Driving Down Disability Equality?' (2014) 21 *Maastricht Journal of European and Comparative Law*, p. 729.
[355] *Z. v A Government Department and the Board of Management of a Community School* [2013] EUECJ C 363/12 (26 September 2013).
[356] C. O' Brien, 'Driving Down Disability Equality?' (2014) 21(4) *Maastricht Journal of European and Comparative Law*, p. 730.
Wolfgang Glatzel v. Freistaat Bayern, Judgement, paragraph 74, "…the court is allowed for the interpretation and review of the legality of legislative acts of the European Union which implement the *principle* laid down in that article, namely the integration of persons with disabilities".
[357] *Ibid*, paragraph 75.

be given more specific expression in EU or national law in order to produce legal effects. Accordingly, Article 26 "cannot by itself confer on individuals a subjective right which they may invoke as such".[358]

The Court clearly reduced the sphere of application of Art. 26 by classifying it as a principle that cannot confer a subjective right on individuals. This interpretation may be problematic when identifying the conditions which "would give rise to an Article 26 case".[359] This Article is indeed considered as a non-interference provision binding only the EU. Moreover, it generates minimal effects as it merely aims at *recognising* and *respecting* the rights of persons with disabilities. This approach reflects the general and vague wording of Article 26 that does not specify the nature of those obligations and measures that Member States should fulfil and enact to integrate persons with disabilities.

The CJEU's reasoning is disputable because it refuses to acknowledge the human rights approach underlying Article 26 of the EU Charter and the importance of those positive rights required to promote the integration of persons with disabilities. This provision should indeed help the CJEU in aligning the judicial interpretation of EU norms with the social model of disability and identifying the obligations of the EU in the area of social and occupation inclusion. The case of *Glatzel* once again shows that the CJEU is highly uncomfortable in recognising the full legal effect of those provisions that may foster disability equality rights.

The next section will examine a remarkable decision of the Court that takes into account discrimination by association. The aim is to delineate a comprehensive picture of the personal scope of the Directive and underline the evolution of the CJEU's interpretation of EU equality norms.

[358] *Ibid*, paragraph 78.
[359] C. O' Brien, Article 26 – Integration of Persons with Disabilities in S. Peers et al., *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014), p. 735.

5. Discrimination by association on grounds of disability

The CJEU, for the first time, introduced the concept of discrimination by association in EU law in the *Coleman* case.[360] This case clarifies whether the Directive prohibits discrimination against an individual by virtue of his or her association with someone who is a disabled person.[361] As it will be shown below, this case represents an important development for EU anti-discrimination law as it extends the personal scope of the Directive 2000/78/EC to those individuals who do not personally possess the protected characteristics.

5.1 Factual background

The claimant, Sharon Coleman, was a legal secretary and mother of a disabled child. She alleged that she was discriminated against and harassed at work after the birth of her child. Her son's condition required specialised and particular care, but her former employer refused to allow her the same flexibility as regards her working hours and the same working conditions as those of her colleagues who were parents of non-disabled children. Ms Coleman was described as 'lazy' when she requested time off to care for her child, whereas parents of non-disabled children were allowed time off.[362] She received insulting comments about both her and her child and was threatened with dismissal after having occasionally arrived late at the office because of problems related to her son's condition. She submitted that such threats were not made to employees with non-disabled children who were late for similar reasons.

Ultimately, Coleman accepted voluntary redundancy and started a procedure before an Employment Tribunal claiming that she had been unfairly dismissed and had been subject to discrimination

[360] Case C-303/06, *Coleman v Attridge Law and Steve Law* (2008) ECR I-05603.
See also, European Commission, *European Anti-Discrimination Law Review*, the European Network of Legal Experts in the non-discrimination field, Issue 18 (2014).
[361] L. Waddington and A. Lawson, *Disability and non-discrimination law in the European Union*, (Luxembourg Publications Office of the European Union 2009), p. 17.
[362] *Coleman v Attridge Law and Steve Law*, paragraph 26.

because she was the mother of a disabled child. Her claim was based on the Disability Discrimination Act 1995 and Directive 2000/78. The claimant argued that the Directive prohibits discrimination not only against disabled persons themselves, but also against individuals who are victims of discrimination because they are associated with a disabled person. The Employment Tribunal found that the case raised questions of interpretation of EU law and decided to refer some questions to the CJEU for a preliminary ruling. The Court was called upon to decide whether the prohibition of discrimination on grounds of disability only protects from direct discrimination and harassment persons who are themselves disabled, or also protects employees because of their association with a person who has a disability.

5.2 The Advocate General's Opinion

The opinion of the Advocate General represents a landmark legal reasoning because it underlines that equality constitutes a fundamental principle of Community. Indeed, Advocate General Poiares Maduro pointed out that Article 13 EC, now 19(1) TFEU, is an expression of the commitment of the Community legal order to the principle of equal treatment and non-discrimination.[363] He contributed to clarify the aim of Article 13 EC and of the Directive which is the protection of the dignity and autonomy of persons belonging to those suspect classifications.[364] A person's dignity and autonomy may be affected when an individual is directly targeted because they have a suspect characteristic. At the same time, he recognised that discrimination can occur in different ways, not only targeting a person who has a particular characteristic. By contrast, another "way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong to the group".[365] The Advocate General emphasised that a substantive approach towards equality should also address these subtler forms of

[363] Opinion of Advocate General Poiares Maduro delivered on 31 January 2008 (1) Case C‑303/06 *S. Coleman V Attridge Law and Steve Law.*
[364] *Ibid*, para 10.
[365] *Ibid*, para 12.

discrimination, because they concretely affect vulnerable people belonging to suspect classifications. He convincingly argued that this form of discrimination jeopardises the ability of persons who have a suspect characteristic to exercise their autonomy. In light of this conceptual background, Advocate General Maduro turned his attention to the Directive and found that the Coleman's case raised an issue of direct discrimination. According to his conclusion, Directive 2000/78/EC must be interpreted as establishing a general framework for equal treatment in employment and occupation that "protects people who, although not disabled themselves, suffer direct discrimination and/or harassment in the field of employment and occupation because they are associated with a disabled person".[366]

Advocate General Poiares Maduro released a meaningful Opinion with regard to the general principles underlying EU equality law and the scope of Directive 2000/78. He emphasised that human dignity and personal autonomy are fundamental values of equality law which are protected by Article 13 EC, now Article 19 TFEU. He considered that directly targeting a person who has a particular characteristic does not constitute the only way of discriminating against him or her, but there are also "more subtle and less obvious ways of doing so".[367] In this respect, he correctly stressed a robust conception of equality that entails other, subtler forms of discrimination. For instance, one way of undermining the dignity and autonomy of people who share a certain characteristic is to target not them, but a third person who is closely associated with them.

Furthermore, the Advocate General offered a detailed analysis of the functioning of Directive 2000/78. He clarified that the Directive performs an *exclusionary* function.[368] This understanding means that religious belief, age, disability and sexual orientation are excluded from the set of legitimate grounds an employer may rely upon to treat one employee less favourably than another. According to this approach, the prohibition of direct discrimination is based on an exclusionary mechanism that prevents an employer from relying on certain grounds to treat employees differently.

[366] *Ibid*, para 25.
[367] *Ibid*, para 12.
[368] *Ibid*, para 18.

By contrast, the prohibition of indirect discrimination encompasses an *inclusionary* mechanism that obliges employers to take into account and accommodate the needs of individuals who belong to certain groups. In doing so, he coherently included discrimination by association in the scope of the prohibition of direct discrimination as a natural consequence of the exclusionary mechanism through which the prohibition of direct discrimination operates. Discrimination on grounds of religion, age, disability and sexual orientation represents unfair treatment breaching dignity and autonomy of individuals. As a result, the fact that an employee who is the object of discrimination does not possess a certain characteristic is irrelevant. The Directive operates at the *level of grounds of discrimination* and requires that an individual has been mistreated on account of 'disability', not on account of '*her* or *his* disability'. This reasoning shifts the emphasis from the person who is discriminated against to the grounds of discrimination covered by Directive 2000/78. It may significantly reinforce EU equality law by triggering the Directive's protection not merely when the claimant is disabled herself/himself, but every time there is an instance of less favourable treatment because of disability.

5.3 Analysis of the judgement: who falls under the protection of discrimination by association?

The CJEU held that the Framework Directive does not limit the principle of equal treatment to people who themselves have a disability within the meaning of the directive.[369] On the contrary, the purpose of the Directive, as regards employment and occupation, is to combat all forms of discrimination on grounds of disability. The analysis of the CJEU focused on the principle of equal treatment enshrined in the Directive, which does not apply to a particular category of person, but to the grounds mentioned in Article 1. In order to support this interpretation, the Court recalled the wording of Article 13 EC, which constitutes the legal basis of Directive 2000/78 and confers on the Community the competence to take appropriate action to combat discrimination based, inter alia, on disability.

[369] L. Waddington, Case C-303/06, S. Coleman v Attridge Law and Steve Law, Judgement of the Grand Chamber of the Court of Justice of 17 July 2008, not yet reported (2009) 46 *Common Market Law Review* 665.

However, the CJEU acknowledged that the Directive includes a number of provisions which apply only to disabled people. For instance, Article 5 sets out the duty to provide reasonable accommodation and implies that employers must take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment. Similarly, Article 7(2) also lays down that, with regard to disabled persons, Member States have the right to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment. Interestingly, the Court found that disability-specific measures do not exclude from the Directive's scope individuals who do not have a disability themselves.[370] Indeed, in the light of the foregoing considerations, the Court stated that:

> "Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a)".

Moreover, the Court applied the same conclusions with regard to the prohibition of harassment and found that it is not limited only to people who are disabled. Accordingly, where it is established that the harassment is suffered by an employee who is not himself disabled but is related to the disability of his child, such conduct is contrary to the prohibition of harassment laid down in Article 2(3).[371]

The wide approach of the Court prevents depriving the Directive of an important element of its effectiveness and reinforces the protection which it is intended to guarantee. However, the Court seems to underline some important requirements to trigger the legal protection under the category of discrimination by association. The CJEU indeed stressed not only the importance of the relationship

[370] *Ibid*, p. 670.
[371] Case of *S. Coleman v Attridge Law and Steve Law*, para 63.

between Ms Coleman and her son, but also noted that the employee primarily needed to take care of her disabled child.[372] In doing so, the Court acknowledged that two determinant elements are required to assess discrimination by association: (i) the existence of a profound legacy and (ii) an apparent level of dependency between the two individuals. This interpretation is likely to extend the protection to those relatives who have the main caring duties with regard to family members with disability. The decision of the Court clearly establishes the necessary guidelines to interpret the prohibition of discrimination and contributes to ensure that national legislations will provide protection against direct discrimination and harassment based on the association with a disable person.[373]

5.4 The controversial nature of reasonable accommodation

As noted above, an interesting matter addressed by the CJEU regards the application of the duty to provide reasonable accommodation according to Articles 5 and 7(2) of the Directive. In relation to the latter obligations, the Court adopted a different interpretation of the Directive's provisions and placed great emphasis on the personal nature of these measures. Thus, the Court clarified that they are specifically related to disabled persons as they only concern positive discrimination measures in favour of persons with disabilities. Moreover, they are specific measures which "would be rendered meaningless or could prove to be disproportionate if they were not limited to disabled persons only".[374] In this way, the Court evaluated reasonable accommodations as "positive discrimination measures" in favour of disabled persons.

The use of the term "positive discrimination" instead of "discrimination" would exclude protection for those non-disabled persons who suffer a disadvantage by virtue of the accommodation provided to persons with disabilities.[375] Positive discrimination means treating one person more favourably

[372] D. Schiek and A. Lawson, *European Union Non-Discrimination Law and Intersectionality Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate, 2011), p. 42.
[373] L. Waddington and A. Lawson, Disability and non-discrimination law in the European Union, *Union* (Luxembourg Publications Office of the European Union 2009), p. 18.
[374] Case of *S. Coleman v Attridge Law and Steve Law*, para 42.
[375] L. Waddington, Case C-303/06, S. Coleman v Attridge Law and Steve Law, Judgement of the Grand Chamber, 46 *Common Market Law Review* 665, p. 679.

than another on the grounds of a specific characteristic. The terminology used by the Court is quite confusing as it differs from the usual approach of EU law, which makes reference to the concept of "positive action". The CJEU's stance is also not compatible with the fundamental provisions of the CRPD.[376] Indeed, Article 2 of the Convection defines a denial of reasonable accommodation as a form of discrimination. By contrast, the Directive does not explicitly classify the failure to provide reasonable accommodation as a specific form of discrimination. In this occasion, the Court's interpretation missed the opportunity to improve the Directive's framework and include the failure to adopt reasonable accommodation within the prohibition of discrimination on grounds of disability. The inclusion of reasonable accommodation into the formal prohibition of non-discrimination would facilitate the realisation of fundamental rights that require implementation through positive measures.

5.5 Concluding remarks

The judgement delivered in the *Coleman* case constitutes an important improvement of EU non-discrimination law as it sets out the conditions to apply the legal protection against discrimination by association under the Directive 2000/78/EC. For the first time, the Court introduced the concept of discrimination by association, which occurs when an individual is discriminated against because of his/her association with someone who possesses a disability or another protected ground. The CJEU significantly extended the fundamental guarantees to those persons who do not have the protected characteristics. The ratio of the judgement is to protect individuals who primarily take care of persons with disabilities and may encounter several environmental obstacles in the workplace. The approach of the Court contributes to empowering a vulnerable category of people through a wide interpretation of the personal scope of the Directive. By contrast, the CJEU's ruling raises several concerns in relation to the duty to provide reasonable accommodation. Now, Article 2 of the CRPD recognises the failure to adopt reasonable accommodation as an unlawful form of discrimination.

[376] *Ibid*, p. 677.

This judgement has been handed down before the ratification of the CRPD by the EU, but it exhibits crucial developments in relation to the personal scope of the Directive 2000/78 marking an important shift towards substantive equality. The Court rightly focused its analysis not on the individual impairment of the claimant, but on the fact that disability was the ground of the less favourable treatment which she claimed to have suffered. In a nutshell, the CJEU shifted the attention from the personal characteristic of the individual to the external barriers hindering her professional life. In doing so, the CJEU anticipated the implementation of some fundamental aspects of the social model of disability introduced by the CRPD. As noted above, this approach has not been fully endorsed in the recent judgements of *Kaltoft* and *Glatzel* where the Court showed a sort of judicial reluctance in applying the social model. It may be said that the CJEU's jurisprudence in relation to the personal scope of the Directive and the legal definition of disability has not developed a clear and coherent position yet.

To complete the study concerning the prohibition of discrimination on grounds of disability, the phenomenon of multiple and intersectional discrimination will now be explored from a legal perspective. The aim is to identify how the EU legal framework tackles multiple and intersectional discrimination and to what extent this phenomenon may be addressed in light of CRPD's rules.

6. Why does multiple and intersectional discrimination matter?

As noted in the second chapter, the CRPD Committee held that the Convention covers both multiple and intersectional discrimination. Multiple discrimination is based on multiple characteristics and includes a situation where a person can experience discrimination on two or several grounds. Intersectional discrimination instead 'refers to a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and thereby expose relevant individuals to unique types of disadvantage and discrimination'.[377]

[377] Committee on the Rights of Persons with Disabilities (2018), General Comment No. 6 on equality and non-discrimination, UN Doc. CRPD/C/GC/6, para. 19.

By contrast, EU anti-discrimination law is single-ground oriented. It lacks a comprehensive approach towards discrimination and does not provide a specific instrument to address multiple and intersectional discrimination. The Directive 2000/78 vaguely refers to multiple discrimination against women in the preamble, but it contains no precise reference to this form of discrimination in the binding norms.[378] The Race Equality Directive does not mention disabled women or disability as a ground of multiple or intersectional discrimination.[379] The Recast Gender Directive does not prohibit discrimination against women with disabilities or any other form of multiple and intersectional discrimination.[380] At EU level, the main effort to tackle this issue has been made during the European Year of Equal Opportunities for All 2007 (EYEOA).[381] The major objective of the European Year was to raise awareness of the right to equality and non-discrimination and of the problem of multiple discrimination. It sought to address multiple discrimination based on two or more of the grounds listed in Article 19 TFEU and to promote a balanced treatment of all these grounds.

From the perspective of international human rights law, only the CRPD mentions the concept of multiple and intersectional discrimination and lays down a specific article that prohibits discrimination against women and children with disabilities. Multiple discrimination is also addressed in the Action Plan 2006-2015 of the Council of Europe, which acknowledges that persons with disabilities face specific barriers and experience two-fold discrimination.[382] It takes into account not only the situation of women and children with disabilities, but also the particular conditions of ageing persons with disabilities and people with disabilities from minorities such as refugees, migrants and Roma. The Plan requires the adoption of relevant policies and implementation measures

[378] Directive 2000//78, recital 3 of the preamble.
[379] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19/07/2000 P. 0022 – 0026.
[380] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (2006) OJ L204/23.
[381] Decision No 771/2006/EC of the European Parliament and of the Council of 17 May 2006 establishing the European Year of Equal Opportunities for All (2007) towards a just society, 31.5.2006, OJEU L 146/1.
[382] Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015, Rec (2006)5.

to remove barriers and challenges faced by each of these groups in order to ensure that individuals can reach their full potentials alongside with other citizens.

In this framework, the adoption of equality law based on an intersectional approach is crucial, because the fragmentation in discrimination legislation may lead to several legal problems as it brings about hierarchies of equality grounds and different level of protection.[383] Diverse equality provisions imply different definitions of the same key concepts and different approaches in terms of protection.[384] In that regard, the protection afforded by EU disability equality law is weaker compared to race and gender anti-discrimination law. Directive 2000/43/EC (Race Equality Directive) has indeed a broader application than the Framework Equality Directive. The former prohibits discrimination in a wide range of activities such as employment and occupation, education, housing and good and services. On the contrary, the scope of the Framework Equality Directive is confined to employment and occupation. As a consequence, a disabled woman of colour may be merely protected with regard to a limited range of areas or may need to recourse to different pieces of legislation to obtain legal protection. The discrepancies in the protection afforded to different grounds and the single approach to equality reduce the guarantees in favour of those individuals who are subject to multiple and intersectional discrimination. Moreover, the absence of proactive duties to deal with intersectional disadvantages in both directives jeopardises the effective eradication of multiple and intersectional discrimination.[385]

[383] D. Schiek and A. Lawson, *European Union Non-Discrimination Law and Intersectionality Investigating the Triangle of Racial, Gender and Disability Discrimination*, (Ashgate, 2011), p. 31.
[384] L. Weddington and M. Bell, More equal than others: distinguishing European Union Equality Directives (2001) 38 *Common Market Law Review* 587.
[385] S. Fredman, Positive rights and positive duties: addressing intersectionality, (2009) in *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional equality law*, edited by D. Schieck and V. Chege. Abingdon: Routledge-Cavendish, 73-89.

The case of *Odar* will be now briefly analysed in order to underline how the CJEU's interpretation of the Framework Equality Directive tends to consider the different grounds of discrimination as "separate harms".[386]

6.1 The *Odar* case: disability and age discrimination

In the *Odar* case, the Court considered both disability and age discrimination, but found that there was only indirect discrimination on grounds of disability.[387] The Court held that the special calculation method adopted to determine compensation for employees over the age of 54 was discriminatory for those disabled employees who would be entitled to an early disability pension.[388]

Dr Odar worked for Baxter Deutschland Gmbh which operated a redundancy scheme based on age, length of service and gross monthly pay. Dr Odar was over 54 and suffered from severe disabilities. According to the German state pension scheme, the claimant was entitled to an ordinary old age pension at 65 and an additional pension for severely disabled people at 60. When the claimant ended his employment contract, he received a gross redundancy payment of €303,253.31. However, by applying the standard formula, if he was not aged over 54, Dr Odar would have received €616,506.63. The claimant therefore claimed both direct age discrimination and indirect disability discrimination due to the calculation criteria of his redundancy payment.

In this case, a special formula was applied to workers over 54 years old which had the effect of reducing compensation. As observed by the Advocate General in her Opinion, the "special formula calculation will always be lower for a severely disabled worker than for a non-disabled worker of the same age".[389] The fact that the calculation is neutrally based on the pensionable age means that

[386] Ann Numhauser-Henning**,** *Elder Law: Evolving European Perspectives* (Elgar, 2017).
[387] CJEU, C-152/1, *Odar v Baxter Deutschland*, EU:C:2012:772, Judgment of the court (Second Chamber) 6 December 2012.
[388] G. de Burca, *Note for the Colloquium on Comparative and Global Public Law* (October, 19, 2016).
[389] CJEU, *Odar v Baxter Deutschland*, para. 57.

disabled workers will receive less compensation on termination of employment because of their serious disability.

Against this background, the CJEU held that the special formula that applies to workers aged over 54 represents a differential treatment on the grounds of age. However, the ECJ found that that the age-based criteria was justified under Article 6(1) as a proportional means to distribute on a fair basis limited financial resources within a social plan.[390] Such a treatment also pursues the legitimate aim to protect younger workers and facilitate their reintegration into employment.

By contrast, the Court positively found that the prohibition of discrimination on grounds of disability precludes the application of an occupational social security scheme under which, the compensation to which workers older than 54 are entitled is calculated on the basis of the earliest possible date on which their pension will begin, with the result that the compensation paid is lower than the standard formula compensation. The measure at issue disregards those risks faced by severely disabled people, who generally face greater difficulties in finding new employment. Severely disabled people have specific needs stemming both from the protection their condition requires and from the need to anticipate possible worsening of their condition.[391]

This case shows that the concept of multiple and intersectional discrimination is not yet embodied in the reasoning of the CJEU. The Court did not take into account the intersectional aspect of discrimination and the fact that different grounds not only add to each other but intrinsically interact. The CJEU rightfully found discrimination on grounds of disability, but it did not expressly recognise the necessity to assess the interaction between several grounds when analysing discriminatory treatments.

[390] P. Craig, G. De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2015), p. 947
[391] CJEU, *Odar v Baxter Deutschland,* para. 69.

The case of *Z. v A Government Department and the Board of Management of a Community School*[392] will now be analysed in order to show how the CJEU is dealing with other cases concerning multiple and intersectional grounds of discrimination.

6.2 *Z. v A Government Department and the Board of Management of a Community School*: Factual background

The request for a preliminary ruling in this case originated from national proceedings between Ms Z, a commissioning mother who had a child trough surrogacy, and an Irish Government Department and the Board of management of a community school. The dispute concerned the refusal to grant Ms Z. paid leave equivalent to maternity leave or adoptive leave following the birth of her child. Ms Z was employed as a post primary school teacher in a school managed by the Board of Management in accordance with the employment's conditions of the Government department. She had a rare disease preventing her from supporting a pregnancy. For this reason, Ms Z and her husband decided to have a child through a surrogacy arrangement and turned to a specialist agency in California. In vitro fertilisation occurred in Ireland and the egg transfer to the surrogate mother took place in California. According to California law, Ms Z and her husband are regarded as legitimate parents of the child. By contrast, Irish law does not regulate surrogacy arrangements and there is no provision about maternity or adoptive leave following the birth of a child under surrogacy. Ms Z. made an application to the Government department to obtain adoptive leave, but the government refused that request because she did not meet the requirements established by the maternity or adoptive leave scheme.

Ms Z. started an action against the Government department before the Equality Tribunal. The claimant argued that she has been discriminated against on grounds of gender, family status and disability. Moreover, she claimed that the Government department failed to reasonably accommodate

[392] *Z. v A Government Department and the Board of Management of a Community School* [2013] EUECJ C 363/12 (26 September 2013).

her as a person with a disability.[393] In light of these circumstances, the Equality Tribunal decided to refer some fundamental questions to the CJEU for a preliminary ruling. The first question concerned whether Directive 2006/54 has to be interpreted as meaning that there is discrimination on the ground of sex where a woman, whose genetic child has been born through a surrogacy arrangement, is refused paid leave from employment equivalent to maternity leave or adoptive leave. Then, the CJEU was asked whether Directive 2000/78 must be interpreted as meaning that there is discrimination on the ground of disability where a woman, who suffers from a disability which prevents her from giving birth, is refused paid leave from employment. Lastly, the Equality Tribunal asked if the UN CRPD is capable of being relied on for the purposes of interpreting and challenging the validity of the Framework Equality Directive.

6.2.1 *Court's findings*

The first question addressed by the Court was the issue of discrimination on grounds of sex with regard to Gender Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.[394] Article 4 of that Directive provides that, for the same work or for work to which equal value is attributed; direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration is to be eliminated. In this context, the Court selected a male comparator to assess whether the refusal to grant maternity leave constitutes unlawful discrimination on grounds of sex.

The CJEU noted that, under the national legislation applicable in the main proceedings, a commissioning father who has had a baby through a surrogacy arrangement is treated in the same way as a commissioning mother in a comparable situation.[395] It follows that a commissioning father

[393] *Z. v A Government department, The Board of management of a community school*, para 44.
[394] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). OJ of the European Union L 204/23.
[395] *Z. v A Government department, The Board of management of a community school*, para 52.

is not entitled to paid leave equivalent to maternity leave. As a consequence, the Court found that the refusal of Ms Z.'s request was not based on a ground that applies exclusively to workers of one sex at the expense of women. Further, the CJEU stated that the claimant could not be subject to less favourable treatment related to her pregnancy because she had not been pregnant. The Court declared that Directive 2006/54 does not undermine the right of Member States to provide distinct rights to paternity and/or adoption leave. It preserves the freedom of Member States to grant or not to grant adoption leave, and that the conditions for the implementation of such leave. In view of these considerations, the Court concluded that a refusal to provide paid leave equivalent to maternity leave to a female worker who had a baby through a surrogacy arrangement does not constitute discrimination on grounds of sex.

The second issue regarded the interpretation of the prohibition of discrimination on grounds of disability as defined by Directive 2000/78. The CJEU referred to the Advocate General's opinions according to which "the inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment".[396] This stance stressed that the claimant's conditions did not prevent Ms Z. from carrying out her work or constituted a hindrance to the exercise of her professional activity. The Court failed to underline the importance of assessing the functional link between the personal impairment and the rule preventing her effective participate in professional life. In doing so, Ms Z. was not recognised as a 'disabled' within the meaning of the Framework Directive and therefore the application of the duty to provide reasonable accommodation was ruled out.

The last question concerned the validity of the Directive in the light of the UN Convention. In that regard, the Court argued that EU case law shows that an EU act may be challenged if incompatible

[396] *Ibid*, Para 81.

with provisions of international law.[397] The validity of the Directive can be assessed only where the provisions of the international agreement appear to be unconditional and sufficiently precise. Such a condition is fulfilled "where the provision relied on contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure".[398] The CJEU considered the CRPD as a 'programmatic' international agreement. To support this argument, it expressly referred to Article 4(1) of the UN Convention that obligates States Parties to adopt all appropriate legislative, administrative and other measures for the implementation of the rights enshrined in that Convention. In addition, the Court also highlighted Article 4(3) of the CRPD, which requires the involvement of persons with disabilities, through their representative organisations, in the development and implementation of legislation and policies to implement the Convention. In those circumstances, the Convention's provisions were not recognised as unconditional and sufficiently precise within the meaning of EU case law. Therefore, the Court laid down that "the validity of that directive cannot be assessed in the light of the UN Convention, but that directive must, as far as possible, be interpreted in a manner that is consistent with that Convention".[399]

6.2.2 *How to deal with multiple and intersectional discrimination under EU law?*

The Court's judgement reveals a weak and inadequate approach in dealing with discrimination based on multiple and intersectional grounds. The arguments used by the CJEU reflect a flaw in the EU legal system which is characterised by a single-ground equality paradigm. It would indeed appear that multiple and intersectional discrimination occurs frequently in the EU labour market and a new holistic approach is needed to accommodate the individual experience of multiple disadvantages.[400]

[397] Case C‑366/10 *Air Transport Association of America and Others* [2011] ECR I‑13755, paragraph 50, and Joined Cases C‑335/11 and C‑337/11 *HK Danmark* [2013] ECR, paragraph 28.
[398] *Z. v A Government department*, para 86.
[399] *Ibid*, para 91.
[400] European Commission Directorate-General for Employment, Tackling Multiple Discrimination Practices, policies and laws (Luxembourg: Office for Official Publications of the European Communities, 2007), p. 47.

Crenshaw argues that "neither the gender aspect of racial discrimination nor the racial aspects of gender discrimination are fully comprehended within human rights discourses".[401]

Similarly, EU anti-discrimination law does not take into account the disability aspect of gender discrimination or the gender aspect of disability discrimination. In one judgement, the Court denied legal protection to a woman who suffered from discrimination on multiple and different grounds. In the case of *Z.*, the CJEU ruled that there was no sex or gender discrimination, no disability discrimination and no violation of EU provisions concerning maternity leave. The lack of a legal instrument which takes into account the intersection of two or more grounds of discrimination may compromise the effective protection of vulnerable individuals.

To give an example, in this case, the claimant was obliged to bring an allegation of sex discrimination separately from the allegation of disability discrimination. This practice implies the impossibility to assess the inextricable link between the two grounds that brings about discrimination. As a result, the claimant, as a woman with disabilities, was not able to find protection under the Equal Treatment Directive and the Employment Framework Directive. The Court found that a commissioning father was not entitled to such leave either and that the refusal did not put female workers at a particular disadvantage compared to male workers. At the same time, it did not recognise the situation experienced by Z. as falling within the personal scope of Directive 2000/78 that prohibits discrimination on grounds of disability. It is noteworthy that the Court operated a comparison with male workers, as opposed to other women. In doing so, it did not compare the situation of a commissioning mother with that of a woman who has given birth or an adoptive mother. This framework of analysis shows that EU law does not always provide the necessary legal tools to identify the proper comparator and tackle multiple and intersectional discrimination. It seems evident that EU

[401] K. Crenshaw, Background Paper for the Expert Meeting on the Gender-Related Aspects of Race Discrimination, United Nations Division for the Advancement of Women (DAW) Office of the High Commissioner for Human Rights (OHCHR) United Nations Development Fund for Women (UNIFEM) Expert Group Meeting on "Gender and Racial Discrimination" (21 – 24 November 2000 Zagreb, Croatia).

law does not accommodate those multiple disadvantages stemming from the combination of vulnerable characteristics such as sex and disability. In such cases, the correct comparator would have been a "non-disabled woman" entitled to obtain the grant of maternity leave.

It may be argued that, the most complex issue in this context concerns the identification of an adequate group with whom to operate a comparison with the disadvantaged individual. EU equality law is deeply linked to the formal idea of comparison which narrows the circumstances for challenging discrimination.[402] The failure to adopt a comprehensive piece of legislation to combat multiple and intersectional discrimination leaves a significant gap in the EU legal system and contributes to enhance the hierarchy of equalities.

6.2.3 *The failure to apply the social model of disability*

It is worth noting that the case of *Z.* also confirms the CJEU's hesitancy in embracing the social model of disability. The Court did not recognise the status of disability of the claimant under the Directive 2000/78. It wrongly hailed the Advocate General's opinion according to which the incapacity to have a child by conventional means does not in itself prevent the commissioning mother from having access to, participating in, or advancing in employment. The Court therefore concluded that "it is not apparent from the order for reference that Ms Z.'s *condition* by itself made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity".[403]

Again, the CJEU's reasoning emphasised the personal condition of the claimant without taking into account the crucial interaction between the individual impairment and the external barriers. This understanding is not convincing as it moves away from the social paradigm of disability and unjustifiably narrows the protection of the Directive 2000/78. Asserting that the individual condition

[402] C. Sheppard, *Multiple Discrimination in the World of Work*, Working Paper no. 66, International Labour Office, Programme for the Promotion of the ILO Declaration on Fundamental Principles and Rights at Work (Declaration), (Geneva ILO, 2011).
[403] *Z. v A Government department*, para 81.

does not jeopardise the claimant's effective participation in professional life is erroneous and echoes a remote medical model of disability. The Court should have noted that the claimant's *infertility,* in interaction with the *external rule* preventing her from taking maternity leave, represents an evident and unlawful hindrance to her professional life.[404] The Court should have applied the social construction enshrined in the CPRD and endorsed by its previous decision in the joined cases of *Ring and Skouboe Werge.*

The analysis of this case indicates that the CJEU's jurisprudence is failing to fully apply the social model of disability in the EU legal framework. The remarkable definition of disability drawn in *Ring and Skouboe Werge* has not been confirmed and crystallised in the following decisions of the CJEU. The Court seems to have definitively left behind the project to promote a judicial approach to disability equality law in compliance with international human rights law.

6.3 The complex interplay between international law and EU law

The case analysed above raises interesting questions regarding the relationship between international law and the EU legal order. As far as international agreements are concerned, EU law lays down that international law is an integral part of the EU legal order. Indeed, according to Article 216(2) TFEU, "agreements concluded by the Union are binding upon the institutions of the Union and on its Member States". At first sight, it would appear that EU law has embraced a monistic approach with respect to its relationship with international law.[405] The monist term refers to a conception that views EU law and international law as one unitary and coherent system. By contrast, the dualist approach considers

[404] C. O' Brien, Driving down Disability Equality? (2014) 21 *Maastricht Journal* of European and Comparative Law 4, p. 728.
[405] B. Van Vooren and R. A. Wessel, *EU External Relations Law* (2014, Cambridge University Press), p. 229.

international law and EU law as distinct and separate legal spheres.[406] However, the Court of Justice's case law shows that the relationship between EU law and international law is highly complicated.[407]

On several occasions, the Court emphasised the necessity to verify the nature of the international agreement in order to admit its direct applicability in the EU legal order. The term 'direct applicability' means that international rules can be applied into EU law without a specific implementation measure, while 'direct effect' implies that relevant norms of EU law can be effectively invoked by individuals in judicial proceedings.

In the case of *Z.*, the CJEU ruled that the CRPD's provisions are not unconditional and sufficiently precise and therefore do not have direct effect under EU law. The Court, in accordance with the opinion of the Advocate General, excluded that the UN Convention may be relied upon to challenge the validity of Directive 2000/78.[408] The Advocate General submitted that Articles 5, 6 and 28 of the UN Convention are not specifically related to employment and occupation as they lay down general obligations addressed to the contracting parties to take steps to ensure that the aims of the UN Convention are achieved.[409] In addition, the General Advocate argued that Article 27(l)(b) of the CRPD leaves at the discretion of contracting parties to determine the measures which may be adopted to safeguard and promote the realisation of the right to work of persons with disabilities on an equal basis with others. According to this stance, Article 27(l)(b) of the CRPD gives wide leeway to the EU institutions to take legislative measures to promote the realisation of rights enshrined in the UN Convention.

[406] G. De Burca, The European Court of Justice and the International Legal Order After Kadi (2010) 51 *Harvard International Law Journal* 1.
[407] See case 181/73 *Haegeman v Belgian State* 1974 ECR 449, Case C–402/05 P and C–415/05, *P. Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I–6351.
[408] Opinion of Advocate General Wahl delivered on 26 September 2013 (1) Case C‑363/12 *Z. v A Government Department and the Board of Management of a Community School*, para 114.
[409] *Ibid*, para 116.

The CJEU embraced the Advocate General's observations and reached a "surprising conclusion"[410] by focusing on Article 4(1) of the UN Convention that imposes on States Parties the general duty to adopt all appropriate measures for implementing the CRPD's rights. For the first time, the Court stated that the CRPD does not produce direct effect because it is drafted in a programmatic form. This judgement reflects the narrow approach adopted in the case of *Air Transport Association of America.*[411] In this instance, the CJEU denied the possibility to rely directly on Article 2(2) of the Kyoto Protocol to contest the validity of Directive 2008/101. The content of the international provision was regarded as not "unconditional and sufficiently precise so as to confer on individuals the right to rely on it in legal proceedings".[412]

Several national courts also consider the CRPD as a programmatic instrument that only outlines general policy objectives which have to be implemented by the States Parties.[413] However, it is worth noting that the CPRD enshrines a binding framework and includes both legal provisions and programmatic standards. *In primis,* all States Parties have the clear legal obligation to implement the CRPD in their national systems by adopting legislative and administrative measures. Article 4 of the CRPD sets out a positive obligation on Sates Parties to ensure and promote the full realisation of all human rights without discrimination of any kind on the basis of disability.[414] Furthermore, the CJEU and national courts have the legal duty to interpret EU and secondary legislation in line with the Convention. The CRPD constitutes an interpretative tool to guide the judicial interpretation of EU and national legislation. This approach has often been confirmed at national level as domestic courts widely rely on the CRPD to interpret domestic law.[415]

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[410] P. Craig and G. De Burca, *EU Law: Text, Cases, and Materials* (2015, Oxford University Press, Sixth Edition) p. 368.
[411] C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change,* ECLI:EU:C:2011:864.
[412] *Ibid*, para 77.
[413] L. Waddington and A. Lawson, *The UN Convention on the Rights of Persons with Disabilities in Practice. A Comparative Analysis of the Role of Courts* (Oxford University Press, 2018).
[414] V. Della Fina, R. Cera, G. Palmisan, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, 2017), p. 142.
[415] L. Waddington and A. Lawson, *The UN Convention on the Rights of Persons with Disabilities in Practice. A Comparative Analysis of the Role of Courts*, Oxford University Press, 2018), p. 555.

The European Court of Justice instead exhibits a particularly 'protectionist' and 'minimalist' approach with regard to the direct effect of international agreements in the EU legal framework. The reasoning of the Court strongly relies on an obsolete 'dualist' paradigm that privileges the autonomy of the EU legal order over its integration into an overarching international legal regime. The Court also avoids explaining the meaning of those conditions required to assess whether the content of an international treaty is "unconditional and sufficiently precise".

6.4 The incongruous CJEU's reasoning: time for a change

Against the above context, it may be said that the CJEU has reduced the chances to invoke international norms with the purpose of challenging rules of EU law. It indeed demands the assessment of 'unconditional and sufficiently precise' international provisions. Such a condition is merely fulfilled where the international norm relied upon contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measures.

The application of this 'test' appears inappropriate because it does not take into consideration the fact that every international human rights instrument needs specific mechanisms and measures to be implemented at EU and national levels. It may be suitable with respect to international agreements that only set out technical regulations and standards, but it results are inadequate in relation to human rights treaties including complex and sensitive legal provisions. To give an example, the Court recognised those provisions of the Open Skies Agreement establishing certain rules designed to apply directly and immediately to airlines as unconditional and sufficiently precise.[416] The Court inaccurately applied the same 'test' in the case of *Z.* to verify the direct effect of the CRPD's provisions in the EU legal order. The CRPD represents an overarching human rights treaty that cannot

[416] Judgement of the Court (Grand Chamber), 21 December 2011, *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v Secretary of State for Energy and Climate Change*, Case C-366/10.

be compared to an international air transport agreement. The peculiar legal nature of human rights treaties requires a more specific and coherent approach to assess their direct applicability at EU level.

In light of these observations, the Court's approach can be considered insufficient and incongruous as it purely aims at limiting the direct invocation of international agreement in the EU. The Court should therefore elaborate a comprehensive range of criteria and guidelines to further clarify the relationship between EU law and international human rights law. In doing so, it should revise the conditions to examine the validity of an EU act in the light of the rules of international law by taking into account the specific nature of human rights treaties.

The decision in the case of *Z.* remains controversial because it also disregards the progressive legal developments led by the CRPD. Indeed, as examined in the first chapter, the Convention not only introduces general obligations, but also specific substantive rights affecting education, health, participation, work and employment, standard of living and social protection. In that regard, Article 27 sets out specific and precise guidelines to promote and implement the right of persons with disabilities to work on an equal basis with others. For instance, it states the prohibition of discrimination with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions.[417] It also imposes the duty to enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training. It furthermore sets out the specific obligation to promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures. This article provides clear objectives and identifies the appropriate means to achieve the scope of the Convention. The CRPD adopts a substantive equality framework characterised by cross-cutting

[417] Art. 27 (a) CRPD.

provisions for implementing disability rights, such as the duty to provide reasonable accommodation.[418] Against this backdrop, it is worth noting that labelling the CRPD as a mere programmatic instrument is highly simplistic. This judgement underlines the complexity of the relationship between international and EU law, but also the importance of investigating the interaction between the UN Convention and EU law in order to define this controversial relationship.

The content of the new equal treatment Directive that prohibits discrimination on grounds of disability and the state of play of the negotiations in the Council on this controversial piece of legislation will now be offered.

7. Updating the EU anti-discrimination framework: the Commission's proposal

In 2008 the Commission presented a proposal for a Directive which addresses discrimination on grounds of disability, religion or belief, age or sexual orientation in both the public and the private sector, concerning access to social protection, education, goods and services (the so-called Horizontal Directive).[419] The aim of the proposal is to set out a uniform minimum level of protection within the EU for people who have suffered such discrimination. It establishes a general framework to combat discrimination and put the principle of equal treatment other than in the field of employment and occupation into effect in the Member States. The new Equality Directive would reinforce the existing legal framework by addressing all four grounds of discrimination through a horizontal approach. The proposal is based on the strategy of the Amsterdam Treaty to contrast discriminatory treatments and is consistent with the horizontal objectives of the EU, in particular with the Lisbon Strategy for

[418] J.E. Lord and R. Brown, 'The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities' in M.H. Rioux, L.A. Basser and M. Jones (eds), *Critical Perspectives on Human Rights and Disability Policy* (Martinus Nijhoff, The Hague, 2011)

[419] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181} COM/2008/0426 final - CNS 2008/014.

Growth and Jobs[420] and the objectives of the EU Social Protection and Social Inclusion Process.[421] Moreover, the Commission recognised the objective to strengthen the fundamental rights of citizens, in compliance with the EU Charter of Fundamental Rights.

The proposed Directive is a very ambitious instrument encompassing significant legal developments in comparison with the current equality framework. Interestingly, the proposal not only bans direct and indirect discrimination, but also acknowledges the denial of reasonable accommodation as an unlawful discrimination. This provision constitutes a remarkable improvement in EU anti-discrimination law, because it is in line with the requirements of the UN CRPD. Disability enjoys a privileged position in the proposed Directive. For instance, Article 4 on "Equal treatment of persons with disabilities" states that:

> "the measures necessary to enable persons with disabilities to have effective non-discriminatory access to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public, including housing and transport, shall be provided by anticipation, including through appropriate modifications or adjustments. Such measures should not impose a disproportionate burden, nor require fundamental alteration of the social protection, social advantages, health care, education, or goods and services in question or require the provision of alternatives thereto".

The latter provision is the keystone of the proposal in relation to the needs of persons with disabilities and outlines a clear "anticipatory obligation" to introduce the necessary measures to guarantee equality. The Commission embraced the legal paradigm according to which human rights demand positive actions and therefore adopted a substantive approach of equality which gives rise to concrete obligations of conduct.[422] Indeed, under Article 5, the Commission lays down the principle that "formal equality does not lead to equality in practice, the principle of equal treatment shall not prevent

[420] The Lisbon Strategy was a "partnership for growth and jobs" between the EU and its member countries. It sets out the general thrust for reforms, the objectives and priorities for action.
[421] Social protection and social inclusion are part of the OMC, a voluntary process for political cooperation based on agreeing common objectives and measuring progress towards these goals using common indicators. The process involves close co-operation with stakeholders, including Social Partners and civil society.
[422] S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008).

any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to religion or belief, disability, age, or sexual orientation." This substantive model of equality endorses the concrete differences of disadvantaged persons and establishes the conditions for accommodating specific biological and unalterable diversities. It also refuses a passive role for the State and points out the necessity to introduce affirmative and relevant measures in the legal system for eliminating unequal treatments. In doing so, the proposal of the Commission reflects the innovations introduced by the CRPD, which aims to encourage a real disability law reform, based on a conception of non-discrimination that goes beyond formal equality and involves a relevant category of substantive rights.[423]

The proposed Directive exhibits relevant changes that can positively impact EU anti-discrimination law, especially with regard to the rights of persons with disabilities. Despite these positive features, the proposal missed an opportunity to tackle two fundamental issues: the concept of disability and multiple and intersectional discrimination. The Commission did not adopt any legal guidelines to assess the concept of 'disability' and identify the *scope ratione personae* of the new Directive. The Commission decided to maintain the same approach used in the existing EU disability discrimination legislation. It considered it difficult to impose a single definition of disability on several Member States with different equality law. Moreover, the proposed Directive does not deal with the crucial issue of multiple and intersectional discrimination, which requires a comprehensive legislative approach for protecting complex individual identities. In this respect, the Commission showed a more prudent stance because it merely regarded multiple and intersectional discrimination as falling outside the scope of the Directive. This approach appears to not interfere with the Member States' freedom to take, or not take action in this area. The lack of legal certainty stemming from the Commission's

[423] G. Quinn, 'The United Nations Convention on the Rights of Persons with Disabilities: toward a new International Politics of Disability' (2009) 15 *Texas Journal on Civil Liberties & Civil Rights* 33.

proposal may have refrained the CJEU from adopting a broader interpretation of the concept of disability and multiple and intersectional discrimination.

In the following sub-section, the amendments submitted by MEPs will be examined in order to assess whether the proposed Directive has been improved in conformity with the CRPD.

7.1 Enhancing the protection: the Parliamentary amendments

In April 2009, the European Parliament (EP) adopted its opinion under the Consultation Procedure. MEPs proposed 80 amendments to the Commission's text with the purpose of improving the legal content of the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.[424] It is noteworthy to underline that the Parliament aimed to introduce a specific provision that emphasises the importance of the principle of equality and the prohibition of discrimination. Amendment 2 set out that "the principle of equality and the prohibition of discrimination are general principles of international, European and national law that bind the EU and its Members States in all matters within their competence. This Directive contributes to reaching this aim and to overcome discrimination that is not compatible with it". This provision would constitute a strong commitment to counteract discrimination, as it places the principle of equality at the heart of EU and national law. To do so, the Parliament recommended referring explicitly to the CRPD for interpreting the provisions of the Directive.

7.1.1 *Embracing the social model of disability*

Amendment 3 stated that "the Directive is one means by which the Community is complying with its obligation under the UN Convention and should be interpreted in that light". The Parliament seems to reinforce the CRPD's status in the EU legal order and stresses the necessity to accelerate its

[424] European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, A6-0149/2009.

implementation. In this framework, one of the most crucial amendments affects the definition of disability. The Parliament assimilated the legal developments occurring at international level and therefore recommended an overarching concept of disability in compliance with the UN Convention. According to amendment 17:

> "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, whether environmental or attitudinal, may hinder their full and effective participation in society on an equal basis with others".

The Parliament reproduced the contents of Article 1 of the CRPD and the fundamental guidelines enshrined in the preamble. Disability was positively acknowledged as an evolving concept that results from the interaction of the individual impairments and the attitudinal or environmental barriers.[425] The main responsibility for eliminating unequal treatment of people with disabilities is therefore placed on society.[426]

Another relevant contribution of the Parliament regarded the explicit recognition of discrimination by association as an autonomous category of discrimination. Amendment 41 proposed the introduction of a new Article 2(4) according to which "discrimination based on assumptions about a person's religion or belief, disability, age or sexual orientation or because of association with persons of a particular religion or belief, disability, age or sexual orientation, shall be deemed to be discrimination within the meaning of Paragraph 1". In addition, Article 2(5) laid down that denial of reasonable accommodation as regards "persons who associate with a person with a disability" shall be deemed to be discrimination, where the accommodation is needed to enable such persons to provide personal assistance to a person with a disability. Hence, the EP showed the relevance of providing reasonable accommodation "by association" and to not limit the duty solely to an individual

[425] F. Butlin, 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments? (2011) 40 Industrial Law Journal 428.
[426] A. S. Kanter, 'The promise and challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2006-2007) *34* Syracuse Journal of International Law & Commerce 287.

who *personally* has a disability. This provision correctly reflected the developments which occurred in the *Coleman* case when the Court of Justice ensured that the UK disability discrimination law provides protection on the grounds of someone's association with a disabled person.[427]

The European Parliament's amendment contributed to reduce the gap between EU anti-discrimination law and its international commitments. In other words, the EP may be said to have improved the Commission's proposal, which previously failed to specify the criteria to fall under the protection of the new Directive.

7.1.2 *Time to take into account multiple discrimination*

The EP's amendments reveal a clear intent to strengthen the model of substantive equality through the recognition of multiple discrimination. The multidimensional equality approach recognises the failure to classify a person on the basis of a single attribute, because various characteristics of an individual or any combination of them could constitute grounds of discrimination.[428] The Parliament proposed to bring the prohibition of multiple discrimination within EU equality law. To this end, the following amendment was proposed:

> "This Directive also takes into account multiple discrimination. As discrimination can occur on two or more of the grounds listed in Articles 12 and 13 of the EC Treaty, in implementing the principle of equal treatment, the Community should, in accordance with Articles 3(2) and 13 of the EC Treaty, aim to eliminate inequalities relating to sex, race or ethnic origin, disability, sexual orientation, religion or belief, or age or a combination of these, and to promote equality, whatever combination of characteristics relating to the above-mentioned factors a person may have. Effective legal procedures should be available to deal with situations of multiple discrimination. In particular, national legal procedures should ensure that a complainant can raise all aspects of a multiple-discrimination claim in a single procedure".

[427] Case C-303/06, *S. Coleman v Attridge Law and Steve Law*.
[428] P. Uccellari, 'Multiple Discrimination: How Law can reflect Reality' (2008) 1 *The Equality Rights Review* 24.

The Parliament sought to enlarge the personal scope of the Directive by means of the addition of a specific article that addresses multiple discrimination. Amendment 37 aimed to enrich the scope of Article 1 of the Directive which should lay down a framework for combating discrimination, "including multiple discrimination", on the grounds of religion or belief, disability, age or sexual orientation. Moreover, Article 1(2) would introduce a clear definition of multiple discrimination that occurs when discrimination is based on any combination of the grounds of religion or belief, disability, age or sexual orientation or on any or more of these grounds. The Parliament's proposal also broadened the list of multiple grounds of discrimination including sex, racial or ethnic origin and nationality.[429] The prohibition of multiple discrimination would contribute to break the cycle of disadvantages and remove social obstacles.[430] By contrast, the unidimensional approach perpetuates the limits of the formal model of equality which does not accommodate the disadvantages of the individual's identity. In this respect, the EP recommended to ensure that a complainant could raise all aspects of a multiple-discrimination claim in a single procedure. The inconsistency of the current legislation lies in the impossibility to raise multiple grounds of discrimination in the same claim. As a consequence, courts face significant difficulties in developing a jurisprudence that takes into account the complex realities of multiple discrimination.[431] As it was previously examined, the Court of Justice recently denied the right to maternity leave to a woman who had a child through a surrogacy agreement. The CJEU ruled that there was neither sex or gender discrimination nor discrimination on grounds of disability. In doing so, the Court did not afford protection to an individual who suffered from cumulative discrimination.

[429] Amendment 37, Proposal for a Directive, Article 1. European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, A6-0149/2009.
[430] S. Fredman, *Discrimination Law* (Oxford University Press, 2011).
[431] C. Sheppard, *Multiple Discrimination in the World of Work*, Working Paper no. 66, International Labour Office, Programme for the Promotion of the ILO Declaration on Fundamental Principles and Rights at Work (Declaration), Geneva: ILO, 2011, p. 28.

The amendments introduced by the Parliament may create the conditions to develop flexible mechanisms to identify a proper comparator and overcome the problems which stem from the traditional categories of anti-discrimination law. The specific proposal of the Parliament could bring about an unprecedented improvement in the legal protection of persons with disabilities, as it seeks to achieve an integrated framework for successfully dealing with multiple discriminations.[432] The following paragraph will investigate in-depth the political and legal reasons that are preventing the final adoption of the proposed Directive.

7.2 What happened to the Commission's proposal?

Following the entry into force of the Lisbon Treaty on 1 December 2009, the Commission's proposal now falls under Article 19 of TFEU. This means that, in order to adopt the Directive definitively, unanimity is required in the Council, following the consent of the European Parliament. Indeed, according to this provision, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, is empowered to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The new procedure under Article 19 (ex 13) of the TFEU implies that the European Parliament is only consulted and its assent is not required to adopt the final Directive. A new "consent procedure" replaced the old "assent procedure". Therefore, the Council is not legally obliged to take account of Parliament's opinion, but in line with the case law of the Court of Justice, it must not take a decision without having received it. Since then, the EP started several informal steps to influence the decision-making process within the Council.

[432] See also amendment 37 Proposal for a directive, Article 1 and Article 2 – paragraph 2 concerning the definition of multiple of discrimination, direct and indirect discrimination.

7.2.1 *Resistance and scepticism in the Council*

The journey of the proposed and controversial Directive through the European institutions is not over yet. The draft proposal is still stuck in the Council, wherein several concerns have been raised about its final adoption. The deliberations of the Council took place in its respective Working Group and led to a range of proposed amendments.[433] The majority of EU countries have reacted positively to the possible introduction of a new Equality Directive, endorsing the fact that it aims to complete the existing legal framework by addressing all four grounds of discrimination.[434] Many delegations have put accent on the importance of promoting equal treatment as a shared social value within the EU and the significance of the proposal in the context of the UN Convention on the Rights of Persons with Disabilities.[435] Notably, some delegations would have improved the protection in favour of persons with disabilities instead of adopting a horizontal approach.

By contrast, certain delegations have raised substantial criticisms in regard to the new Equality Directive. Owners of companies and a few Member States are mainly worried by the economic impact of the Directive's implementation.[436] These delegations outlined the necessity to acquire more experience with the implementation of existing Community before the introduction of a new extensive legislation. They also had concerns about the timeliness of the Commission's proposal and the need to respect the division of competences, the principles of proportionality and subsidiarity. Furthermore, they argued that the financial and practical implications of the provisions enshrined in the Directive are highly burdensome. With this backdrop, the negotiations within the Council are

[433] Impact Assessment Unit, Implementing the principle of equal treatment between persons Complementary Impact Assessment of the proposed horizontal Directive on Equal Treatment (January 2014) Brussels, European Parliament, p. 13.
[434] Progress Report on the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation from the Presidency of the Council of the European Union to the Permanent Representatives Committee (Part I) / Council (EPSCO), Brussels, 26 May 2009.
[435] See docs 12892/2/08 REV 2, 12892/08 ADD 1 REV 1 and 8321/09.
[436] P. Coleman and R. Kiska, 'The proposed EU "Equal Treatment" Directive How the UK gives other EU member States a Glimpse of the Future' (2012) 5 *International Journal for Religious Freedom* 113.

highly complicated and the process to reach a compromise seems very intricate. In the next sub-sections these issues within the Council will be closely scrutinised.

7.2.2 *The principle of subsidiarity: obstacle or opportunity?*

A few delegations argued that the Horizontal Directive would alter the division of competences between the European Union and the Member States as defined by the Treaties. In accordance with this position, the introduction at the European level of the "equal treatment" Directive would breach the principles of subsidiarity. In particular, some European countries fear the legal obligation concerning the access to goods and service, education and social protection to everyone and, consequently, claim the national competence to legislate in these matters. However, significant progress was made under the Latvian Presidency which succeeded to in clarify the Directive's scope as well as the division of competences between the EU and its Member States.[437]

It may be worth recalling that the principle of subsidiarity represents a fundamental principle for the functioning of the EU, which governs the distribution of competences between EU and Member States.[438] Article 5(3) of the TEU states that:

> "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."[439]

This principle sets out the essential preconditions for the intervention of EU institutions. It is "a rule of the proper execution of Community powers (Kompetenzausubungsregel)".[440] Article 5 emphasises

[437] Report of the Presidency of the Council of the European Union to the Permanent Representatives Committee/Council on the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Brussels, 4 June 2015.
[438] A. G. Toth, 'The principle of subsidiarity in the Maastricht treaty' (1992) 29 *Common Market Law Review* 1079.
[439] Treaty on European Union, C 325/57, Art. 5.
[440] C. Henkel, 'The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiary' (2002), 20 *Berkeley Journal of International Law*, p. 359.

that the area concerned must not fall within the Union's exclusive competence. The EU has to take action in cases where it would act more effectively than Member States, which cannot sufficiently achieve the action proposed.[441] Article 5 (4) adds the further condition of proportionality according to which "any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".

In light of the above principle, it is necessary to examine whether the EU's action to combat disability discrimination in areas beyond employment would undermine the division of competence between EU and Member States.[442] The EU institutions have already adopted a directive dealing with the prohibition of discrimination beyond employment relationships.[443] The EU enacted the Race Equality Directive 2000/43/EC for combating discrimination on the grounds of racial and ethnic origin and sex in the context of employment, access to goods and services and in accessing the welfare and social security system. The Preamble of the Race Directive expressly recognises the importance of the principles of subsidiarity and proportionality as set out in Article 5 of the EC Treaty. Member States acknowledged that:

> "The objective of this Directive, namely ensuring a common high level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved by the Community. This Directive does not go beyond what is necessary in order to achieve those objectives".[444]

The approval of the Race Equality Directive constitutes a significant precedent in EU law. As a consequence, it demonstrates that the adoption of an Equality Directive addressing discrimination in the fields of access to goods and services, welfare and social security systems does not interfere with

[441] N. de Sadeleer, 'Principle of Subsidiarity and the EU Environmental Policy' (2012) 9 *Journal for European Environmental Planning* 63.
[442] H. J. Steiner, 'Subsidiarity under the Maastricht Treaty', in D. O'Keeffe and P. M. Twomy (eds), *Legal Issues of the Maastricht Treaty*, p. 58-57.
[443] S. Peers and N. Rogers, *EU Immigration And Asylum Law: Text And Commentary* (Martinus Nijhoff Publishers, Leiden, 2006) p. 781.
[444] Principle 28 of Preamble of the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

the division of competences between the EU and the Member States. Hence, the new Horizontal Directive would cover the application of the principle of equal treatment within the specific limits of EU competences. It may be argued that once the EU has performed its legislative role under the Treaty to regulate a particular matter, Member States cannot claim a violation of the subsidiarity principle in a similar situation.

Moreover, the objectives of the proposed action cannot be sufficiently achieved by the Member States, who have different national legislation concerning equality and non-discrimination. The urgent need to provide a uniform and comprehensive piece of legislation stems from the signature and ratification of the CRPD. To this end, a directive is the best instrument to ensure a coherent minimum level of protection against discrimination across the EU. The adoption of the Equal Treatment Directive would accelerate the process to harmonise the different legal orders within the EU enhancing the protection of their citizens.

7.2.3 *Does EU action go beyond what is necessary to achieve?*

Another important requirement established by Article 5 demands that EU action does not go beyond what is necessary to achieve.[445] This principle of proportionality affects the measure chosen to reach the goal and implies the adoption of the less restrictive norm.[446] In this regard, the Directive does not impose specific measures on Member States to implement the prohibition of discrimination, but leaves them significant leeway to apply the EU provisions. The 2015 report of the Working Party on Social Questions concerning the proposed Directive outlined that Member States would still retain the main responsibility for the organisation of their social protection and educational systems.[447] Member States would continue to retain their discretional powers for organising, commissioning and

[445] P. Graig and G. De Burca, *EU law, text, cases and materials* (Fourth Edition, Oxford University Press, 2008), p. 100.
[446] T. I. Harbo, The Function of the Proportionality Principle in EU Law (2010) 16 *European Law Journal* 158.
[447] Outcome of proceedings of the Working party on Social questions on the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, 8679/15, Brussels, 13 May 2015.

providing services of general economic interests. For instance, the concept of "access" embraced by the Directive does not encompass the determination of whether a person is entitled to obtain social protection or education. Member States are called upon to set out the conditions to identify those persons eligible for protection or education. In doing so, the Directive does not undermine the discretion of Member States in defining the personal scope of the protection. The Working Party also stressed the content of the exclusive competence of Member States as regards the organisation of their national protection and educational systems. With regard to social protection, Member States would have exclusive competence for the setting up, financing and managing of such systems and related institutions as well as the competence for determining the substance, the amount, the calculation and the duration of benefits and services.[448] At the same time, they have to introduce the conditions of eligibility for benefits and services, as well as for the adjustment of those conditions in order to ensure the sustainability of public finances. The Horizontal Directive only underlines that the concept of social protection includes social security, social assistance, social housing and health care. The Directive would cover those rights and benefits that derive from general or special social security, social assistance and healthcare schemes, which are provided by the State or by private parties funded by the State.

In the matter of educational systems, EU countries would exercise their exclusive competences "for the setting up, financing and management of educational institutions, for the development of curricula and other educational activities, for the definition of examination process and for the setting conditions of eligibility, including, for example, age limits regarding eligibility for schools, scholarship or courses".[449] It is evident that Member States would retain the main competence in organising their educational system and the content of teaching and of educational activities, including the provision of special needs education.

[448] *Ibid*, p. (17f).
[449] *Ibid*, p. (17ga).

The Latvian Presidency's clarification called for a broad flexibility in the application of the principle of equal treatment and showed the pragmatic intention to reach an agreement between the Member States. This legal background does not limit the wide margin of discretion of the Member States and their exclusive competences with respect to the implementation of the EU Directive. It could be said that the subsidiarity argument submitted by some Member States is not relevant to exclude the legitimacy of the EU action with regard to equality law. This concept, along with the principle of proportionality, represents a very vague and non-legal notion that should not constitute an obstacle to limit the EU's legislative capacity.

The main amendments introduced by the Council will now be analysed and it will be shown that the Council's latest draft narrowed the protection of the proposed Directive.

7.3 The new equality framework: one step forward, two steps back?

Significant changes have been made with regard to the prohibition of discrimination and the scope of the proposed Directive. According to Article 1 of the last Council's draft, the Directive lays down a framework for combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation, with a view to putt the principle of equal treatment within the scope of Article 3 into effect in the Member States.[450] The new purpose of Article 1, as amended by the Council, narrows the corresponding provision of the Commission's proposal. It indeed excludes multiple discrimination from the protection of the Directive and covers only the areas mentioned under Article 3. The Commission's proposal introduced a wide purpose through the adoption of an "open-ended" clause which aims to putting into effect the principle of equal treatment in any areas "other than employment and occupation". The Council's amendment confined the application of the equality provisions to those fields expressly covered by the Directive.

[450] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, 10780/17, Brussels 29 June 2017.

Moreover, the Council did not consider the EP's amendment which sought to define and prohibit multiple discrimination. The latest provision of the Directive merely recognises the possibility to address multiple discrimination against woman without embracing the comprehensive definition adopted by the Parliament. Recital 13 lays down that "in implementing the principle of equal treatment irrespective of religion or belief, disability, age or sexual orientation, the European Union should, in accordance with Article 8 of the Treaty on the Functioning of the European Union, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination".[451] The approach of the Council reduces the level of protection of those vulnerable persons who may suffer discrimination on any combination of the grounds of religion or belief, disability, age or sexual orientation. The Council rejected the extensive improvements made by the Parliament that enlarged the prohibition of multiple discrimination to the grounds of sex, racial or ethnic origin and nationality in accordance with Directives 2000/43/EC[452] and 2004/113/EC.[453]

It may be argued that the prohibition of multiple and intersectional discrimination still represents a crucial issue at EU political level. In 2017, the Maltese Presidency, with the support of the EP and civil society organisation, proposed significant amendments to include the concept of multiple and intersectional discrimination in the final draft. Remarkably, the Presidency sought to specify that "discrimination could also intersect with discrimination on the grounds of racial or ethnic origin and nationality, as well as sex or gender identity". The progress report however highlights that some delegations in the Council were not in favour of singling out a specific provision concerning multiple and intersectional discrimination and preferred to refer to it in general terms.[454] The negotiations'

[451] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Report Progress 10780/17, Brussels 29 June 2017.
[452] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin Official Journal L 180, 19/07/2000 P. 0022 – 0026.
[453] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004.
[454] Progress report on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, 9481/17, Brussels, 1 June 2017.

outcome confirms the assumption that Member States are not yet prone to revise their legislative equality frameworks and adapt them to the highest standards of protection of international human rights law. The adoption of an express provision prohibiting multiple and intersectional discrimination would indeed imply reviewing those equality norms that require a formal comparator to assess a discriminatory treatment and do not allow to claim discrimination on different grounds in the same compliant. As EU equality law does not encompass a specific provision prohibiting multiple and intersectional discrimination, the majority of Member States have not introduced any laws to address it.[455]

7.3.1 *The concept of discrimination under the Council's proposal*

Major amendments affected Article 2 of the Directive in relation to the concept of discrimination. The Council included 'discrimination by association' in the principle of equal treatment and crystallised the findings of the CJEU in the *Coleman* case.[456] The Court found that discrimination by association occurs when a person is discriminated against because of his/her association with someone who possesses a disability or another protected ground. The recognition of this form of discrimination represents an important development of EU equality law as it covers those individuals who effectively take care of vulnerable persons. The Council also revised the concept of harassment, which may be "defined in accordance with the national laws and practice of the Member States". In doing so, it left a significant discretion to Member States to detail the content of 'harassment' in the light of their national legal systems.

It is worth saying that the Latvian Presidency gave an important contribution with regard to the interpretation of the concept of discrimination under Article 2. It pointed out that, notwithstanding paragraphs 1 and 2, the Directive shall not preclude differences of treatment consisting in more

[455] European Commission, *Tackling Multiple Discrimination Practices, policies and laws* (Luxembourg: Office for Official Publications of the European Communities, 2007).
According to this report, only Germany, Austria and Spain address multiple discrimination in their legal system.
[456] Case C-303/06, *S. Coleman v Attridge Law and Steve Law* (2008) ECR I-05603.

favourable for persons with disabilities as regards conditions of access to social protections, education and supply of goods and services. The Directive admits the possibility to guarantee favourable treatments for persons with disabilities in order to reinforce the implementation of the principle of equality. The introduction of this paragraph would enlarge the protection afforded to persons with disabilities in comparison with the Commission's proposal, which only takes into account differences of treatment on grounds of age.

7.3.2 *The scope of the proposed Directive*

The Latvian Presidency also clarified the scope of the prohibition of discrimination under Article 3 of the proposed Directive. It lays down that the prohibition shall apply to all persons, as regard both public and private sectors, including public bodies, in relation to access to social protection, education and supply of goods and other services.

Notably, the area of 'social advantages' has been deleted by the new Council's draft as EU law would allegedly not establish a clear definition of social advantage. This term is only mentioned in Article 7(2) of Regulation No 492/2011 on freedom of movement for workers within the Union.[457] The CJEU explained that the term means all the advantages which, whether or not linked to a contract, are generally granted to national workers. For instance, it covers public, transport, fare reductions for large families, child raising allowances, funeral payments, minimum subsistence payments and study grants.[458] The Court of Justice, in the case of *Christini v SNCF*, held that this concept applies to all advantages, not just to those limited to a contract of employment. [459] In this case, a reduced fare entitlement was claimed by the widow of an Italian SNCF worker. The French SNCF railway company provided a scheme that offered a fare reduction to persons with large families. The SNCF

[457] Regulation (EU) no 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, 27.5.2011 Official Journal of the European Union L 141/1.
[458] See also Case C-85/96, *Martinez Sala*; case 32/75, *Cristini v SNCF* ECR [1975] 1085, case C-237/94, *O'Flynn* [1996] I-2617; case 75/63, *Hoekstra & Case* 22/84, Scrivner; case 235/87, Matteucci, case C-3/90, *M. J. E. Bernini v Minister van Onderwijs en Wetenschappen and Commission v. Netherlands* case C-542/09.
[459] Case 32/75 *Fiorini a.k.a. Christini v SNC*, CJEU.

claimed that it was not available to foreign workers because Article 7(2) applied only to social advantages related to a contract of employment. The Court of Justice rejected the position of SNCF and showed a broad approach according to which also family members can benefit from social advantages.[460]

It is noteworthy to underline that the prohibition of discrimination in relation to social advantage constitutes a fundamental aspect of the protection afforded to persons with disabilities and their family members as it covers essential financial benefits and non-financial advantages. The removal of this provision from the proposed Directive represents a backward step for the protection of vulnerable individuals under EU equality law.

By contrast, the Council's amendments enlarged the content of the prohibition of discrimination with regard to access to social protection. The Council specified that access to social protection includes social security, social assistance and social housing and healthcare. Under this paragraph, the Directive aims to cover the entire process of seeking information, applying and registration as well as the actual provision of social protection measures.

The same wording is used to regulate access to education and supply of goods and other services.[461] The proposed Directive however does not apply to matters covered by family law, including marital status and adoption, as well as laws on reproductive rights. To the same extent, the organisation and funding of Member States' social protection and educational systems does not fall under the scope of the Directive. The prohibition of discrimination also affects individuals providing goods and services.

[460] C. Barnard, *The Substantive Law of the EU The Four Freedoms* (Oxford, University Press, Fourth Edition), p. 292.
[461] Outcome of proceedings of the Working party on Social questions 8679/15, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, ibid:
Art. 3.1. (c) Access to education. Access under this point shall include the process of seeking information, applying and registration […] as well as the actual admission to and participation in educational activities;
(d) Access to and supply of goods and other services, including housing, which are available to the public and which are offered outside the context of private and family life. Access under this point shall include the process of seeking information, applying, registration, ordering, booking, renting and purchasing […] as well as the actual provision and enjoyment of the goods and services in question.

The Directive does not jeopardise the freedom to choose a contractual partner for a transaction, but it prohibits making such a choice on grounds of person's religion or belief, age, disability and sexual orientation. This prohibition should only apply to persons providing good and services that are available to the public. It does not cover goods and services which are provided in the area of private and family life. The last version of the Directive replaces the provision of the Commission's proposal that confined its application to individuals only insofar as they are performing a professional or commercial activity. This new wording may extend the area of application of the prohibition outside the context of private and family life, but it will mainly depend on the interpretation of the meaning of 'private and family life'.

The efforts made by the Latvian Presidency in 2015 are still highly relevant and created the conditions where Member States could reach an agreement. It detailed the content of central issues such as the concept of non-discrimination, the scope of the proposal and the distribution of competences in order to draw a clear picture of the areas covered by the Directive.

Further developments have recently been made under the Slovak Presidency with regard to other sensitive issues such as the interplay between the Horizontal Directive and those provisions on accessibility for persons with disabilities included in the proposed European Accessibility Act (EEA), the prohibition of non-discrimination of specific age groups and the remit of national equality bodies.[462] Despite that, the 2016 progress report concludes that further political discussions are needed to reach the required unanimity in the Council.

[462] See for instance the Progress Report on the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Brussels, 22 November 2016, 14284/16.

7.3.3 *Reasonable accommodation: narrowing the Commission's approach*

Another important amendment submitted by the Council regards the duty to provide reasonable accommodation. Article 4(a) of the proposed Directive states that "in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided within the areas set out in Article 3". This new provision points out a clear definition of reasonable accommodation that includes those "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms". Interestingly, the Council embraced the same definition of reasonable accommodation enshrined in the CRPD, but eliminated the reference to the crucial "anticipatory duty" of the Commission's proposal.

In addition, the new proposed Directive does not require the provider of housing to make structural alterations to the premises or to pay for them in order to comply with the above obligation. The duty upon the provider to make structural modifications is imposed in the sole case such alterations are funded by public investments.[463] The Council also intervened to clarify the extent to which the reasonable adjustments cause a disproportionate burden on the duty-holders. It sets out precise guidelines such as:

> a) the size, resources and nature of the organisation or enterprise, aa) the negative impact on the person with a disability affected by the fact that the measure is not provided; b) the estimated cost; c) the estimated benefit for persons with disabilities; d) the life span of infrastructures and objects which are used to provide a service; e) the historical, cultural, artistic or architectural value of the movable or immovable property in question; f) the safety and practicability of the measures in question.

[463] Art. No. 4(a)(3) of the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

The Directive introduces detailed standards for assessing the impact of the reasonable accommodation and adds four new requirements such as i) the negative impact on the person with a disability affected by the fact that the measure is not provided; ii) the life span of infrastructures and objects which are used to provide a service; iii) the historical, cultural, artistic or architectural value of the movable or immovable property in question and iv) the safety and practicability of the measures in question.

However, the duty to provide reasonable accommodation has been alleviated in comparison to the proposal of the Commission and the Parliament's amendments. Indeed, the lack of a clear anticipatory obligation undermines the entire effectiveness of the provision and perpetuates the inconsistency of the current legislation. It is evident that Member States are afraid of imposing challenging duties on both private and public companies in order to implement the right of persons with disabilities to have access to education, social protection and goods and services. The economic aspect of the Directive will now be analysed with the purpose of assessing its impact on the budget of Member States and private enterprises.

7.4 *Financial implications: is the Directive too costly and burdensome?*

Member States claim that the Directive would provoke burdensome economic consequences and excessive additional duties.[464] In this respect, it is important to underline that the Proposed Directive guarantees a significant leeway to Member States to comply with the EU provisions. The recent negotiations within the Council further extended the timeline concerning the Horizontal Directive's implementation. Indeed, the transposition period is four years for the introduction of laws, regulations and administrative provisions, while it is five years for ensuring accessibility to new buildings,

[464] As the negotiations within the Council are made behind closed doors, it is very difficult to individuate which exactly are the Member States that are obstructing the adoption of the proposed Directive. However, according to the NGO AGE Platform Europe, the German Federal Government is mainly responsible for this impasse, because it continues to refuse to hold a substantive debate on this topic. See also the Press Release, NGOs call on Germany to stop blocking the Equal Treatment Directive, Brussels, 23rd July 2015.

transport services and infrastructure. Moreover, the latest amendments introduced an additional period of 20 years to provide accessibility for all other existing buildings, facilities, vehicles and infrastructures undergoing significant renovations.[465] At the same time, Member States would maintain their exclusive competence for the organisation of the main areas covered by the Directive. This framework can therefore not be said to overburden the economic system of national governments, but it entails flexible conditions and timetables for a progressive realisation of those obligations introduced by the Directive.

7.4.1 *Costs of discrimination in education and health care*

Extensive research has been made by the EU institutions in relation to the impact of the Directive on Member States, with a particular focus on public service providers and small and medium enterprises (SMEs).[466] The main NGOs working to combat discrimination in Europe have revealed that "long-term costs of exclusion and discrimination are higher than short-term costs of inclusion and integration".[467]

The Commission found that the impact of discrimination on the basis of disability is particularly serious in the area of education and health care.[468] Persons with disabilities often have a lower level of education and consequently lower educational qualifications. This means that they will encounter several obstacles to reach their full potential in the labour market. The employment rate of disabled people (50%) is still below that for the rest of the population (65%). According to the Commission's

[465] Art 15 of the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.
[466] See for example, European Parliamentary Research Service, Implementing the principle of equal treatment between persons Complementary Impact Assessment of the proposed horizontal Directive on Equal Treatment, (January 2014, Brussels). See also, Commission staff working document, accompanying the Proposal for a council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation Impact Assessment, COM(2008) 426 final, (Brussels, 2.7.2008).
[467] Joint NGO Statement: EU equal treatment law: the time is now! Adopted by the "The Equality for All", a coalition comprised of: AGE Platform Europe; European Disability Forum (EDF); European Network Against Racism (ENAR); European Youth Forum; ILGA-Europe - the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association; Social Platform; European Women's Lobby; International Lesbian, Gay, Bisexual, Transgender and Queer Youth and Student Organisation (IGLYO); European Network on Religion and Belief (ENORB); Eurochild. Brussels, 18 June 2015.
[468] Commission staff working document, COM (2008) 426 final.

research, the wage loss in the EU because of the lower education level of 3,592,000 severely or moderately disabled persons is estimated to amount to €28bn per annum.[469]

As a consequence, the lower participation rate or qualification level of individuals with disabilities also negatively affects also their economic performance in the labour market. The loss of Gross Domestic Product is estimated to reach around 40.3 billion euro per annum. In addition, the Commission stated that almost 8.4 million disabled individuals face discrimination with regard to access to health services, and the resulting ill health is calculated to produce a loss of 599 million euros in net wages per year. Ill health brings about lower economic performance and a loss of GDP as a result of a diminishing workforce, estimated at 812 million euros per year. In this context, the direct tax revenue foregone is estimated to add up to around 213 million euros a year.[470]

It cannot be denied that the structural changes required by the Directive are challenging in terms of short-terms goals, but they can produce considerable economic gains and long-term improvements for all of society. The concrete implementation of human rights requires economic expenditure and positive actions by governments. For this reason, the 'too costly' argument advanced by the Member States is also incompatible with the current human rights obligations. The full realisation of civil and political rights or socio-economic rights relies on the budgetary resources invested by State Parties, as all rights have budgetary implications and rights of persons with disabilities require supplementary funds.[471]

7.4.2 *Costs for SMEs and public service providers*

The central duty of private and public entities is to provide reasonable accommodation. Therefore, service providers will have to adapt their services to the needs of persons with disabilities. For

[469] *Ibid*, p. 74.
[470] *Ibid*, p. 75.
[471] I. E. Koch, 'From Invisibility to Indivisibility: the International Convention on the Rights of Persons with Disabilities' in O. Arnardottir & G. Quinn (Eds.) *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Leiden: Martinus Nijhoff), p. 72.

instance, SMEs that provide goods and services are obliged to adapt their premises to persons with disabilities. At the same time, public entities have to modify both infrastructure and websites in the light of their available resources and the fundamental nature of their services. The last study commissioned by the Parliament to assess the impact of the proposed Directive on SMEs shows that the majority of costs would affect the realisation of adjustments to premises, but a greater burden would be placed on public service providers compared with SMEs.[472]

In particular, the obligation to provide reasonable accommodation with regard to access to goods and services is mainly influenced by the way the provider performs its business. For instance, a company that provides services such as utility and professional services may have to adapt its communication materials and methods, whilst a goods provider may need to provide infrastructure adjustments where physical access to premises is essential. Hard costs are related to the necessity to make buildings and associated equipment accessible where the service is provided in a building. Soft costs depend on the way the service is provided and require changes to policies and procedures, ad hoc service changes and trainings. Duties upon private and public companies entail significant costs and benefits related to physical infrastructure and less expensive adjustments to non-physical infrastructure.

The complementary impact assessment of the European Parliamentary Research Service found that regulatory and generic compliance costs over a five-year implementation period are estimated from €78 million euro in the Czech Republic to €492 million in Germany.[473] The 20-year implementation period may reduce the gap between costs and benefits and mitigate the economic burden originating from the Directive's application. The hard costs required by the proposed Directive are considerably significant, but they would bring about relevant long-term benefits for a great portion of EU population.

[472] European Parliamentary Research Service, Implementing the principle of equal treatment between persons Complementary Impact Assessment of the proposed horizontal Directive on Equal Treatment, p. 198.
[473] *Ibid*, p. 197.

7.5 Final evaluation of the proposed Horizontal Directive

The last section of this chapter has analysed the new Horizontal Directive proposed by the Commission, the amendments of the Parliament and the main issues raised by national governments within the Council. The proposed Directive was originally meant to be an overarching piece of equality legislation covering discrimination outside the area of employment. Its scope was to prohibit discrimination based on religion or belief, disability, age or sexual orientation by both the public and private sector in social protection, including social security and health care, social advantages, education, access to and supply of goods and services which are available to the public, including housing.

The Commission's proposal aimed to put in place a comprehensive EU equality framework with the purpose to reinforce the protection of persons with disabilities in compliance with the obligations stemming from the CRPD's ratification. The amendments of the Parliament further improved the legal protection of the proposed Directive through the adoption of a wide definition of disability and the explicit prohibition of multi-discrimination. Despite these political efforts, the negotiations on the Horizontal Directive are currently in deadlock within the Council. The last Council instrument shows the difficulty to achieve a piece of legislation fully in compliance with the CRPD. A substantial discrepancy emerges from the initial Commission's proposal and the final Council's draft. In particular, the major amendments presented by the Parliament have been completely overlooked.

The negotiations within the Council exhibit the resolute scepticism of owners of companies and the opposition from important Member States, especially from Germany, as they would be the most affected by the Directive's adoption. The last Council's instrument restricts the protection for persons with disabilities and ignores the relevant improvements advanced by the Parliament. The Council's approach aims to confine the application of the Directive to those areas covered by Article 3 and excludes the prohibition of discrimination in the field of 'social advantages'. The elimination of this

sensitive area narrows the material scope of the Directive and conflicts with the proposals of both the Commission and Parliament. In addition, the Council does not refer to multiple discrimination under the purpose of the Directive and merely mentions the objective to promote equality between men and women, especially since women are often victims of multiple discrimination. In doing so, the Council not only rejects the outstanding work made by the Parliament with regard to an exhaustive definition of multiple discrimination, but it leaves a great void in the EU legal system. The Council has also removed the 'anticipatory' obligation to provide reasonable accommodation on workplace and specifies that the providers of housing are not required to make structural alterations to the premises in order to accommodate the needs of persons with disabilities. By contrast, the anticipatory duty is only guaranteed in relation to the identification and elimination of obstacles and barriers to accessibility.[474]

The most significant improvement introduced by the Council is solely represented by the explicit recognition of discrimination by association and denial of reasonable accommodation as unlawful forms of discrimination. The last instrument provided by the Council therefore reflects a political compromise that favours those Member States who agree on the final adoption of a weaker Directive in comparison with the original Commission's proposal.

It may be argued that a new Horizontal Directive would not overwhelm the economic capacity of the Member States as the short-term costs of inclusion and integration are widely compensated by future benefits in terms of the growth of GDP and taxes. Moreover, the subsidiarity argument submitted by the Member States may be viewed as a legalistic strategy to avoid supranational commitments. Member States would indeed retain their exclusive competences in the organisation of the areas

[474] Art. 4 of the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation: Accessibility for persons with disabilities: "Member States shall take the necessary and appropriate measures to ensure accessibility for persons with disabilities, on an equal basis with others, within the areas set out in Article 3. These measures should not impose a disproportionate burden. 1A. Accessibility includes general anticipatory measures to ensure the effective implementation of the principle of equal treatment in all areas set out in Article 3 for persons with disabilities, on an equal basis with others.

covered by the Directive. The new Horizontal Directive would address the principle of equal treatment within the specific limits of the EU competences such as the Race Directive already did in the past. In light of this intricate scenario, Member States are encouraged to accelerate the negotiations for a definitive adoption of the proposed Directive. A new multidimensional and comprehensive approach is needed to change outdated paradigms and eliminate hierarchy of equality. At the same time, they are called upon to introduce appropriate amendments in order to comply with their international obligations and enrich the protection of human rights in the European Union.

The following table summarises the evolution throughout the legislative process of the main articles concerning the Directive's purpose, the concept of discrimination and the duty to provide reasonable accommodation.

Article	Commission Proposal	**Amendment**	Parliament Amendments	**Article**	Council changes
Art. 1 Purpose	The Directive lays down a framework for combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment other than in the field of employment and occupation.	**Amend. 37 for Art. 1**	1. This Directive lays down a framework for combating discrimination, **including multiple discrimination**, on the grounds of religion or belief, disability, age or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment other than in the field of employment and occupation.	**Art.1**	The Directive lays down a framework for combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment within the scope of Article 3.
Recital 13	In implementing the principle of equal treatment irrespective of religion or belief, disability, age or sexual orientation, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.	**Amend. 37 for Art.1 (2)**	2. Multiple discrimination occurs when discrimination is based: (a) on any combination of the grounds of religion or belief, disability, age, or sexual orientation, or (b) on any one or more of the grounds set out in Paragraph 1, and also on the ground of any one or more of (i) sex (in so far as the matter complained of is within the material scope of Directive 2004/113/EC as well as of this Directive), (ii) racial or ethnic origin (in so far as the matter	**Recital 13**	In implementing the principle of equal treatment irrespective of religion or belief, disability, age or sexual orientation, the European Union should, in accordance with Article 8 of the Treaty on the Functioning of the European Union, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

			complained of is within the material scope of Directive 2000/43/EC as well as of this Directive), or iii) nationality (in so far as the matter complained of is within the scope of Article 12 of the EC Treaty). 3. In this Directive, multiple discrimination and multiple grounds shall be construed accordingly.		
Art. 2 Concept of Discrimination	For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination on any of the grounds referred to in Article 1.	**Art. 2 (1)**	No changes	**Art. 2**	1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no discrimination on any of the grounds referred to in Article 1. For the purposes of this Directive, discrimination means: (a) direct discrimination; (b) indirect discrimination; (c) harassment; (d) instruction to discriminate against persons on any of the grounds referred to in Article 1; (e) denial of reasonable accommodation for persons with disabilities; (f) direct discrimination or harassment by association.

Art. 3 Scope	Discrimination shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: a) Social protection, including social security and healthcare; b) Social advantages; c) Education; d) Access to and supply of goods and other services which are available to the public, including housing. Subparagraph (d) shall apply to individuals only insofar as they are performing a professional or commercial.	**Art. 3**	Discrimination shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: a) Social protection, including social security and healthcare; b) Social advantages; c) Education; d) access to and supply of goods and other services which are available to the public, including housing and transport. Subparagraph (d) shall apply to individuals only insofar as they are performing a professional or commercial activity. (d) (a) affiliation to and activities in associations and the services provided by such organisations.	**Art. 3**	Within the limits of the competences conferred upon the European Union, the prohibition of discrimination shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: a) Access to social protection, including social security, social assistance, social housing and healthcare; b) blank; c) access to education; d) access to and supply and other service, including housing, which are available to the public and which are offered outside the context of private and family life.
Art. 4 **Equal treatment of persons with disabilities**	1. In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities: a) The measures necessary to enable persons with disabilities to have effective non-discriminatory access to social protection, social advantages, health care,	**Art. 4**	No Changes	**Art. 4**	1. Member States shall take the necessary and appropriate measures to ensure accessibility for persons with disabilities, on an equal basis with others, within the areas set out in Article 3. These measures should not impose a disproportionate burden.

	education and access to and supply of goods and services which are available to the public, including housing and transport, shall be provided by anticipation, including through appropriate modifications or adjustments.				1a. Accessibility includes general anticipatory measures to ensure the effective implementation of the principle of equal treatment for persons with disabilities in the areas set out in Article 3.
Art. 4(1)	Art. 4(1) b) Notwithstanding the obligation to ensure effective non- discriminatory access and where needed in a particular case.	**Amend. 97 for Art. 4 para. 1(a)**	In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, (…): a) The measures necessary to enable persons with disabilities to have effective non-discriminatory access to social protection, social advantages, health care, education and access to and supply of goods and services which are available to the public (…), shall be provided by anticipation, including through appropriate modifications or adjustments.	**Art. 4a**	1. In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided within the areas set out in Article 3. 2. Reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate burden, where needed in a particular case, to accommodate the specific needs of a person with a disability (…).

CHAPTER 4

EU GOVERNANCE

1. Ratifying and implementing the UN Convention: winners and losers of the EU institutional game

On 30 March 2007, the EU signed the UN Convention on the Rights of People with Disabilities on its opening day for signature. The CRPD has been signed and ratified by all 28 EU countries and a further 120 states worldwide. On 23 December 2010, the EU formally ratified the treaty. In doing so, it was the first, and so far only, international organisation to have become a party to the Convention.[475] The accession by the EU to the CRPD represents an unprecedented event in international and EU law. It is the first time that the EU as a whole signed and ratified a comprehensive human rights treaty.

The EU's capacity to negotiate and conclude international agreements on its own behalf is set out in Article 216 TFEU:

> "The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope".

The Treaties lay down that agreements concluded by the Union are binding on its institutions and its Member States. Interestingly, the CPRD's conclusion is said to constitute a "mixed" agreement to the extent that the EU and Member States are separated contracting parties and have 'concurrent powers' to conclude such agreement.[476] As a consequence, EU institutions are bound to the provisions falling within EU competence and Union secondary legislation must be enacted in compliance with

[475] Art. 43 of the CRPD states that "the present Convention shall be subject to ratification by signatory States and to formal confirmation by signatory regional integration organizations. It shall be open for accession by any State or regional integration organization which has not signed the Convention".

[476] M. Rhinard, M. Kaeding, The International Bargaining Power of the European Union in 'Mixed' Competence Negotiations: The Case of the 2000 Cartagena Protocol on Biosafety (2006) 44 *Journal of Common Market Studies* 1023.

the Convention's rules. In the light of this framework, this chapter will explore the role performed by EU institutions in the ratification and implementation process of the UN Convention. The aim is to identify how the EU governance architecture is changing in order to deal with the CRPD.

2. The negotiations of the CRPD and the EU

The EU played a significant role in the process of negotiating and drafting the UN Disability Convention. The main institution involved in this procedure was the Commission, which lobbied for the adoption of an international instrument to protect the rights of persons with disabilities since the 2003.[477]

Indeed, the Commission released the Communication "Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities" in order to emphasise the importance of reinforcing the existing international framework for the protection of persons with disabilities.[478] In May 2004, the Council authorised the Commission to conduct negotiations on behalf of the then European Community. The Commission acknowledged that persons with disabilities are often marginalised because of physical, technical and social obstacles that prevent them from fully enjoying their rights in all regions of the world. The Commission proposed that "rather than create new law, the instrument should tailor the existing human rights implementation standards to the specific circumstances of people with disabilities, thereby improving access for people with disabilities to their rights".[479] The Commission Communication highlighted the goal to put into place a legally binding instrument that could reinforce the prohibition of non-discrimination and the principle of equality:[480]

[477] G. de Burca, The EU in the negotiation of the UN Disabilty Convention (2010) 35 *European Law Review* 174.
[478] Communication from the Commission to the Council and the European Parliament of 24 January 2003 "Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities" COM (2003) 16 final.
[479] *Ibid*, Introduction.
[480] L. Waddington, 'Breaking New Ground: The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community' in O. Arnardottir & G. Quinn (Eds.) *The United Nations*

> "Equal access to the human rights can be guaranteed by ensuring that people with disabilities are not discriminated against on the grounds of their disability. The legally binding instrument should protect people with disabilities from discrimination in having access to and enjoying human rights".[481]

The EU's position in favour of an international binding treaty based on equality and non-discrimination has often been considered restrictive and prudent. For instance, Gráinne de Búrca argued that while the EU promoted a strong disability agenda, the Commission appeared sceptical with regard to the adoption of a separate Convention including substantive rights for disabled persons. On the contrary, the emphasis placed by the Commission on the principle of equality derived from the need to identify the legal basis of Community competence to negotiate the CRPD.[482] The Commission mentioned Article 13 of the EC Treaty because this provision (now Article 19 TFEU) enabled the Community to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation, in the areas of Community competence. In doing so, the Commission confirmed the leading role of the European Community at international level in carrying out an overall strategy concerning disability, which also represents a shared commitment by all Member States. The most important and beneficial results of the Commission's work during the CRPD's negotiations will be highlighted below.

2.1 The Commission's contribution to the drafting of the CRPD

The Commission promoted the realisation of an international instrument to identify the full spread of human rights including political and civil/fundamental rights as well as economic, social and cultural rights. The Commission Communication hailed the human rights approach according to which states should take action to ensure that in reality people with disabilities are in a position to exercise their

Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives (Leiden: Martinus Nijhoff), p. 119.

[481] Communication from the Commission to the Council and the European Parliament of 24 January 2003.

[482] L. Waddington, Breaking New Ground: The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community, in O. Arnardottir & G. Quinn (Eds.) *The United Nations Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Leiden: Martinus Nijhoff), p. 119.

rights.[483] It also encouraged the establishment of a strong monitoring mechanism to successfully implement the new international instrument.[484] The Commission's stance did not aim at obstructing the adoption of a substantive rights-based Convention. It rather pushed for introducing relevant provisions of EU equality law within the CRPD's framework. The Communication indeed outlined the goal to bring the Community's experience in the field of combating discrimination at international level. In particular, the Commission set out those guiding principles that should have informed the Convention, drawing upon the experience of Directive 2000/78/EC concerning equal treatment in employment and occupation, which embodies specific provision for people with disabilities. The Commission's contribution sought to ensure consistency between EU law and international legal standards in relation to the protection of disabled persons.

The work of the Commission during the negotiations also decisively helped strengthening the European Community's role on the international stage. The European Commission's officials indeed explicitly demanded the insertion of an article in the Convention's final draft to recognise the accession of international organisations to the CRPD. The action carried out by the Commission successfully culminated with the introduction of Articles 43 and 44, which provide the possibility for regional integration organisations to become party to the CRPD. It may be argued that the Commission, acting on behalf of the European Community (now EU), substantively contributed to the development of the existing UN binding instrument to safeguard the rights and dignity of persons with disabilities.

2.2 Ensuring coordination between various EU actors

The negotiations revealed how various institutional and non-institutional EU identities interact with each other. In this regard, the Commission's role was not merely confined to the external representation of the European Community. During the CRPD's drafting, the work of the Member

[483] Communication from the Commission to the Council and the European Parliament of 24 January 2003.
[484] *Ibid.*

States was concretely coordinated by the Commission in order to present common position. It provided relevant expertise for the Member States in relation to EU disability law.[485] The Commission also clarified the legal contents of Directive 2000/78 with the purpose of supporting the work of national delegations and avoiding discrepancies with EU law. Its coordinating function at the pre-sessional meetings was essential to purse a consensus position among the then 27 Member States with different political interests and legal approaches. Along with the Commission, the EU Presidency of the Council was committed to drive forward the work of the Member States within the pre-sessional meetings. Importantly, the discussion between the EU Member States was coordinated by the representatives of the country holding the Presidency of the Council of the EU.[486]

The synergy between the Commission, the Council and the Member States facilitated the negotiations for the CRPD's adoption and contributed to the development of a European shared strategy. Ultimately, the EU participation in the negotiations of the CRPD was also characterised by a pioneering alliance between the Commission and civil society organisations. In particular, the European Disability Forum (EDF) acted to support the EU's position enhancing its role as a global actor. EDF contributed to promoting and protecting EU interests before other international actors.

At the end of this process, on 27 February 2007, the Commission presented a proposal for a Council Decision on the signing, on behalf of the European Community, of the CRPD and its Optional Protocol.[487] The Council Decision, dated 27 March 2007, authorised the Community to sign the CRPD and issued a declaration on the Optional Protocol stating that the Council of the European

[485] G. de Burca, The EU in the negotiation of the UN Disability Convention, 35 *European Law Review* 174, p. 181.
[486] The presidency of the Council of the European Union (EU) rotates among the EU Member States every six months and the country holding the presidency drives forward the Council's work.
[487] Proposal for a Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, presented by the Commission, Brussels, 29.8.2008 COM (2008) 530 final 2008/0170 (COD).

Union shall reconsider the question of signing the Optional Protocol by the European Community as soon as possible.[488] As previously noted, the EU signed the CRPD on 30 March 2007.

2.3 The Commission and the Union's external policy representation

The negotiations of the Convention offer an interesting case study into the EU institutional architecture and the relationship between the main EU institutions. The Commission performed a steering role to shape the EU external policy with regard to disability and prevent internal divergences between Member States. It may be said that the Commission, as guardian of the Treaties, excellently interpreted its role because it ensured the application of the Treaties and of EU legislation. It indeed promoted those values, legal provisions and objectives enshrined in Directive 2000/78. To the same extent, the Commission improved internal coordination so that the EU and its Member States acted efficiently together and spoke with one voice. The Commission's nomination as the only EU negotiator correctly reflect the content of Article 218 TFEU according to which:

> "the Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.
>
> The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted."

This provision, in contrast with previous Article 300 EC,[489] does not identify the Commission as the unique negotiator, but leaves the Council the power to nominate it depending on the subject of the

[488] Council Decision (EC) on the signing, on behalf of the European Community, of the United Nations' Convention on the Rights of Persons with Disabilities, 20 March 2007, 7407/07.
[489] Article 300 EC identified the Commission as the only negotiator: "Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it".

agreement envisaged.[490] Notwithstanding this vague language, it seems evident that only the Commission and the High Representative can be nominated as negotiator. In this regard, the Commission should be appointed as negotiator when the international agreement entails matters of internal policy-making not related to the common foreign and security policy (CFSP). This provision should be read together with Article 17 TFEU that establishes the duty of the Commission to ensure the Union's external representation with the exception of the CFSP. It is clear that the Treaties confer on the Commission the delicate function to ensure consistency between international agreement and EU law. The Commission had the institutional capacity to fit a complex international human rights instrument, such as the CRPD, into the wider EU law framework. The mechanisms adopted by the EU to monitor the correct implementation of the Convention will be now examined.

3. Monitoring the CRPD's implementation: new governance mechanisms

The Convention introduces a unique mechanism of regional and national monitoring of its implementation.[491] Article 33 of the CRPD sets outs a 'three-tier' monitoring framework which includes a national or regional focal point, an independent mechanism to promote, protect and monitor the implementation of the Convention and the involvement of civil society:[492]

> 1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.
>
> 2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present

[490] P. Eeckhout, *EU External Relations Law* (Oxford European Law Library, 2011), p. 196.
[491] G. De Beco, Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: another role for national human rights institutions? (2011) 29 *Netherlands Quarterly Human Rights* 84.
[492] Directorate-General for External Policies of the Union, Implementation of the UN Convention on the rights of persons with disabilities in the EU's external relations, EXPO/B/DROI/2012/19, December 2013.

Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

This new system complements the traditional mechanism provided at international level by the UN Committee on the Rights of Persons with Disabilities, which has competence to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.[493] Article 33 CRPD is therefore the most complete and peculiar provision on national level implementation and monitoring ever drafted in a human rights international agreement.[494] It indeed provides for the creation of independent national mechanisms besides traditional international human rights mechanisms. By doing so, Article 33 CRPD includes a set of provisions that resemble the new governance architecture of the EU.

The concept of new EU governance stresses a shift away from the monopoly of traditional politico-legal institutions and highlights the governing legitimacy and capacity of a broad sphere of actors.[495] The new EU governance model therefore includes "regulatory approaches which are less rigid, less prescriptive, less committed to uniform outcomes, and less hierarchical in nature". [496] This approach implies the prevalence of voluntary and non-binding norms over coercive instruments, along with the involvement of stakeholders in the decision-making process. An overview of the main EU governance forms will now be offered, showing the interplay between Article 33 CRPD and the current EU

[493] Art.1 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities.
[494] G. de Beco, *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities* in Europe, Regional Office for Europe of the UN High Commissioner for Human Rights (2014).
[495] G. de Búrca and Joanne Scott, 'Introduction: New Governance, Law and Constitutionalism', in J. Scott and G. de Búrca (eds), *Law and New Governance in the EU and the US* (Portland, Hart Publishing, 2006).
See also C. Scott, Governing without Law or Governing without Government? New-ish Governance (2009) 15 *European Law Journal* 160.
[496] *Ibid*, p.3.

governance mechanisms. In particular, the purpose of this study is to investigate to what extent the EU has implemented Article 33 CRPD.

3.1 The experimentalist paradigm

The CRPD embodies significant characteristics of the so-called experimentalist governance regime.[497] Experimentalist governance constitutes a form of political cooperation based on open-ended and participatory procedures that promote interaction between local and transnational actors.[498] In particular, experimentalist governance informs the treaty-body monitoring systems of the UN human rights regime and the transnational certification of environmental standards.[499] This model focuses on the establishment of open-ended goals which are implemented by lower-level actors. Final results are subject to peer review and practices are systematically evaluated in light of the data collected. The experimentalism architecture requires the participation of stakeholder in the implementation process, an influential role of national monitoring mechanisms and regular reviews of the system.

Article 33 CRPD may be said to reflect the main features of the experimentalist system to the extent that: i) States should designate one or more independent mechanisms to promote, protect and monitor implementation of the Convention; ii) stakeholders, in particular persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process; iii) States Parties shall take into account the status and functioning of national institutions for protection and promotion of human rights (NHRIs). In addition, the CRPD adopts a flexible approach with

[497] G. de Burca, The EU in the negotiation of the UN Disability Convention, 35 *European Law Review* 174.
See also C. F. Sabel and J. Zeitlin, Learning from difference: The New Architecture of Experimentalist Governance in the European Union (2008) 14 *European Law Journal* 271.
J. Heymann, M. A. Stein, and G. Moreno, *Disability and Equity at Work* (Oxford University Press 2014), p. 417.
[498] G. de Búrca, R. O. Keohane & C. Sabel, *"New Modes of Pluralist Global Governance"* (2013). New York University Public Law and Legal Theory Working Papers, Paper 386.
[499] *Ibid*, p. 26.

regard to several provisions and allows States Parties an appropriate degree of freedom to develop minimum standards, guidelines and benchmarks in consultation with civil society.[500]

In line with the experimentalist paradigm, Article 31 furthermore sets out that States Parties have to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the Convention. It seems clear that the CRPD includes innovative mechanisms of the experimentalism governance and enhances the involvement of stakeholders in all areas of the Convention's implementation. The systematic interaction between different actors, coupled with continuous feedback and monitoring initiatives, represents a key aspect of the CRPD's implementation.

3.2 The open method of coordination

Article 33 of the CRPD embraces the principle of participation that underpins the model of good governance proposed in the White Paper by the European Commission.[501] This concept aims inter alia at improving the quality, relevance and effectiveness of EU policies by means of "wide participation throughout the policy chain from conception to implementation".[502] Participation should entail an inclusive approach in the process of developing and implementing EU policies. The aim is to create more confidence in the final result and in the institutions which deliver policies. The first chapter of this study has analysed the fundamental performance of civil society in the CRPD's negotiations. However, non-governmental organisations have also been called upon to play an influential position in the implementation procedure.

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[500] T. J. Melish, The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify (2007) 15 *Human Rights Brief* 37.
For instance, Art. 3 CRPD sets out sets general and broad principles such as "respect for dignity, full participation and inclusion, non-discrimination, respect for difference, equal opportunity, accessibility, gender equality, and respect for the evolving capacities of children".
[501] European Commission, European Governance, A White Paper, Brussels 25.7.2001, COM (2001) 428 Final.
[502] *Ibid*, p. 10.

The mandate conferred upon civil society along with the provisions concerning the national implementation and monitoring of the CRPD mirror the essential characteristics of the open method of coordination (OMC).[503] The OMC is often considered the ideal model of experimentalist governance. Indeed, it is a system for coordinating policies among Member States through procedures of soft law in order to achieve EU objectives.[504] This form of intergovernmental policy-making does not result in binding legislative measures and takes place in areas which fall within the competence of EU countries, such as employment, social protection, education, youth and vocational training. The participation of different actors is considered as an excellent landmark of the decisional and implementing process.[505] In this respect, the OMC's emphasis on broad participation reveals striking similarities with the structure of those independent mechanisms required by Article 33 of CRPD. This provision expressly demands the full participation of civil society in the monitoring process. National independent institutions shall therefore include stakeholders and persons with disabilities in their organisations. Such independent mechanisms have to promote, protect and monitor the implementation of CRPD.

The OMC also promotes at EU level decentralised reciprocal learnings and voluntary participation of Members States within an open network, in which benchmarks, peer review, multilateral surveillance, scoreboards, trend charts are essential tools to spread transnational policies and promote policy learning.[506] To the same extent, the CRPD includes a familiar obligation on States Parties to collect and research data in order to formulate and implement effective policies with regard to persons with disabilities. Moreover, Article 40 CRPD contains the general duty on the States Parties to meet regularly in a conference for the purpose of considering and reviewing any matter in relation to the

[503] J. W. Reiss, Innovative Governance in a Federal Europe: Implementing the Convention on the Rights of Persons with Disabilities (2014) 20 *European Law Journal* 107.
[504] C. M. Radaelli, *The Open Method of Coordination: A new governance architecture for the European Union* (the Swedish Institute for European Policy Studies, 2003).
[505] J. Scott and D. M. Trubek, 'Mind the gap: Law and new approaches to governance in the European Union' in (2002) 8 *European Law Journal* 1.
[506] M. Heidenreich and G. Bischoff, The Open Method of Coordination: A Way to the Europeanization of Social and Employment Policies? (2008) 46 *Journal of Common Market Studies* 497.

CRPD's implementation. The objective of this governance model is not merely the involvement of civil society in policy-making, but it seeks to carry out periodic evaluation, monitoring and peer review of policies in order to exchange best practices. To this end, it facilitates experimentation and diffusion of new knowledge.[507]

To conclude, it may be argued that the CRPD's monitoring system combines several aspects of the EU governance mechanisms. In the light of this conceptual background, the next section will examine how Article 33 has been understood and applied by EU institutions and lower-level actors.

3.3 The focal point

The first requirement of Article 33 is the establishment of one or more focal points for matters relating to the implementation of the Convention, given due consideration to the designation of a coordination mechanism within national governments to facilitate related actions in different sectors and at different levels.

To this end, the Council Decision 2010/48/EC lays down that, with respect to matters falling within the Community's competence, the Commission shall be a focal point for matters related to the CRPD's implementation.[508] The Code of Conduct between the Council, Member States and the Commission setting out internal arrangements for the implementation by and representation of the EU relating to the CRPD provides additional details regarding the general functions of the EU focal point.[509] The Commission holds the power to convene, on its own initiative or at the request of a Member State's focal point, a coordination meeting with the focal points of the Member States.[510] Moreover, in respect of matters falling within the Union competence, the Commission is in charge of

[507] J. Scott and D. M. Trubek, Mind the Gap: Law and New Approaches to Governance in the European Union (2002) 8 *European Law Journal* 1.
[508] Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities.
[509] Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08).
[510] Paragraph 11 (d) of the Code of Conduct.

drafting the Union report, and may agree with Member States on the information they shall provide to enable it to do so.[511] The Union report is a fundamental tool to monitor the work of the EU in relation to the CRPD's implementation, because it analyses each legislative acts adopted by the Union that address those matters governed by the Convention. The Code of Conduct emphasises the necessity to strengthen the cooperation between Member States and the Commission. In particular, they are called upon to provide information to each other, before submitting the report to the Committee on the Rights of Persons with Disabilities.[512] Lastly, the Commission performed the fundamental duty to propose an appropriate framework for one or several independent mechanisms, taking into consideration the involvement of civil society and all the relevant Union institutions, bodies, offices or agencies.

The above-mentioned instruments however do not identify the Commission's service responsible for performing the tasks of the EU focal point. *De facto*, the Unit JUST D.3 "Rights of Persons with Disabilities'" has taken upon the role of coordinating the work of the Commission in this field and implementing the European Disability Strategy 2010-2020.[513]

The Commission has always pointed out the need for a new approach to implement disability rights which focuses on the identification and removal of the various barriers preventing disabled people from achieving equality of opportunity and full participation in all aspects of life. In this respect, the Commission has committed itself to review its socio-economic policies, programmes and projects in order to include rights and concerns of people with disabilities. However, the Commission experienced significant difficulties in carrying out its function because disability represents a cross-cutting issue that falls under different legal areas and touches several competences. As a consequence, the Commission engaged all relevant Directorates-General in the Inter-Service Disability Group with

[511] Paragraph 12 (c) of the Code of Conduct.
[512] Paragraph 12 (d) of the Code of Conduct.
[513] Directorate-General for External Policies of the Union, *Implementation of the UN Convention on the rights of persons with disabilities in the EU's external relations*, EXPO/B/DROI/2012/19 (December 2013), p. 21.

the purpose of improving its own internal machinery and supporting exchanges between its departments. They meet on a regular basis to exchange information and develop proposals for a better cross-sectoral coordination. The group promotes an effective inter-sectoral cooperation within the Commission in the field of disability.

The designation of the Commission, as the focal point for the implementation of the Convention at EU level, is the logical outcome of its relevant contribution to the CRPD's drafting. The role conferred to the Commission is in line with its mission to promote the general interest of the European Union, which the Commission accomplishes by participating in the decision-making process and overseeing the correct implementation of the Treaties and EU law. The Commission again emerges as one of the most important EU actors for implementing disability rights. The governance mechanisms that have been designated for ensuring coordination within national governments and facilitating action in different sectors and at different levels will now be outlined.

3.4 Coordination mechanism

The designation of a coordination mechanism between the EU and the Member States is a crucial step forward in the process for monitoring and implementing the CRPD.[514] This approach seeks to promote cooperation between ministries in order to avoid the adoption of discordant and isolated measures by policymaker.

As proposed by the Commission in its Communication on 30 July 1996, the High Level Group (DHLG) was set up to monitor the latest policies and priorities of governments concerning people with disabilities.[515] The DHLG provides a significant involvement of representatives of people with disabilities in the follow-up of relevant policies and actions in their favour. This group constitutes a network of experts, representatives of the Member States, national focal points and NGOs to pool

[514] Commission Staff Working Document, Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union, Brussels, 5.6.2014, SWD (2014) 182 final.
[515] COM (96) 406 final.

information and experience. The meetings take place in Brussels twice a year by invitation of the Commission.[516] The DHLG releases recommendation to the Commission on methods for reporting and addressing the situation of persons with disability in the EU. Furthermore, the Commission and the DHLG annually publish a joint report concerning the CRPD's implementation. The reports encompass information on developments made in the establishment of the governance structures and processes foreseen by Article 33 of the CRPD. In these ways, the Commission and Member States reinforce cooperation in the field of disability and promote the exchange of good practice in the EU context. The DHLG, as a Commission expert group, encourages the dialogue between EU and national actors by means of flexible and non-bindings interactions. Indeed, it lacks formal tools to shape the CRPD's implementation at European or national level and does not participate in the approval of the initial report to the UNCRPD Committee by the EU.

Similarly, the Commission's goal to support mutual learning and exchange of good practices is also pursued within the Work Forum on the Implementation of the Convention that meets every year since 2010. The Forum's composition reflects that of the DHLG and brings together representatives of the governance mechanisms provided by Article 33 CRPD, such as civil society, focal points, coordination and monitoring mechanisms. The Work Forum represents a platform for sharing experiences on the practical CRPD's implementation and monitoring in order to promote solutions to common challenges.[517]

Lastly, it is worth noting that political coordination is guaranteed within the Council Working Group on Human Rights (COHOM), which deals with human rights aspects of the external relations of the EU and supports the Council's decision-making process in this area.[518] According to the Code of

[516] Directorate-General for External Policies of the Union, *Implementation of the UN Convention on the rights of persons with disabilities in the EU's external relations*, EXPO/B/DROI/2012/19 (December 2013), p. 21.
[517] J. Zeitlin, *Extending Experimentalist Governance?: The European Union and Transnational Regulation* (Oxford University Press, 2015), p. 313.
[518] The Human Rights Working Group (COHOM) was created under the Council of the European Union in 1987 (with the extension of its mandate in 2003) and is responsible for human rights issues in the EU's external relations.

Conduct, coordination meetings between the Member States and the Commission are held within the competent Council Working Group, composed of the representatives of Foreign Ministers of the MS.[519] Coordination meetings are convened at the Presidency's own initiative or at the request of the Commission or a Member State, with possible reference to the Disability High Level Group in its area of competence. These meetings mainly focus on the division of competences and tasks between the EU and Member States. In particular, the Commission and the Member States, during the coordination meetings, "decide who will deliver any statement to be made on behalf of the Union and its Member States in cases where the respective competences are inextricably linked".[520] The work within the COHOM is essential to ensure sincere cooperation and complementarity between the EU and its Member State.[521] In addition, the COHOM plays an important formal role in the approval of the European independent monitoring mechanism. It participates in the preparation of the Union's position ahead of the UN High-Level meeting on Disability and Development in New York and in the discussion on the initial report of the EU to the UN Committee on the Rights of Persons with Disabilities.[522]

This institutional context highlights the existence of governance mechanisms which privilege informal arenas, cooperative problem solving and flexible instruments to facilitate exchange and mutual learning between the Member States and the EU.[523] Thus, the Commission does not have formal and binding tools to coordinate policies of national governments and facilitate action in different sectors and at different levels. The EU embraced a coordination mechanism based on mutual learning programmes and stakeholders' participation under the Commission's institutional umbrella

[519] Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), paragraph 6(a).
[520] *Ibid*, para 6(c).
[521] *Ibid*, para 12.
[522] Directorate-General for External Policies of the Union, Implementation of the UN Convention on the rights of persons with disabilities in the EU's external relations, EXPO/B/DROI/2012/19, December 2013, p. 22.
[523] See for instance J. Corkin, Constitutionalism in 3D: Mapping and Legitimating Our Lawmaking Underworld (2013) 19 *European Law Journal* 637.

in order to implement Article 33(1) CRPD. The structure of the EU independent monitoring framework created according to Article 33(2) CRPD will now be examined.

4. The EU Framework for promoting, protecting and monitoring the CRPD

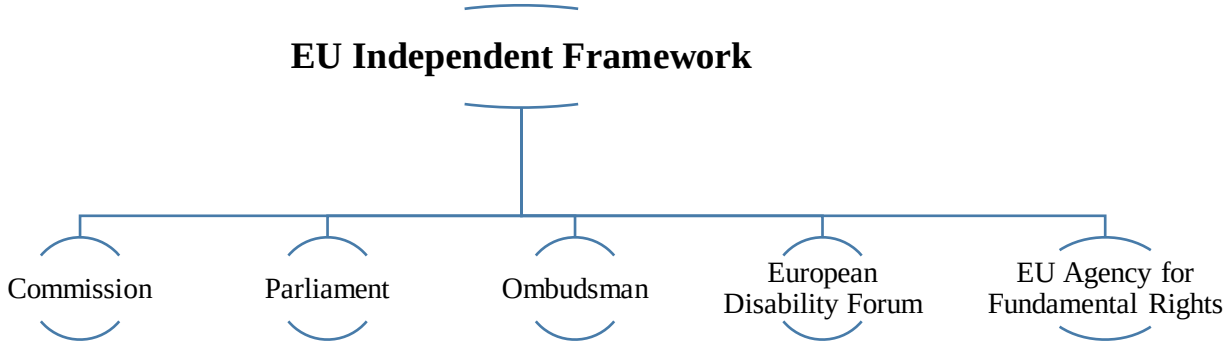
The EU introduced a monitoring framework that promotes, protects and monitors the good implementation of the Convention in areas falling within EU competences. Promotion implies raising awareness of the Convention by organising public events and by providing trainings both to public officials and private citizens. Protection requires the assessment of individual complaints with regard to the violations of rights of persons with disabilities. Monitoring entails the evaluation of the compliance of legislation and practice with the CRPD.[524] The Council put the Commission in charge of proposing an appropriate framework for one or several independent mechanisms, taking into account all relevant Union institutions, bodies, offices or agencies.[525] To this end, the Commission identified five existing EU institutions and bodies to perform the tasks required by Art 33(2) CRPD: the European Parliament's Petitions Committee, the European Ombudsman, the European Commission, the EU Agency for Fundamental Rights (FRA) and the European Disability Forum (EDF). On 25 January 2012, the Commission's proposal was formally submitted to the Member States in COHOM and was definitively adopted by the Council on 29 October 2012.[526]

The EU framework complements the national frameworks and independent mechanisms which bear the main responsibility for the promotion, protection and monitoring of the UNCPRD within the Member States.[527] The EU framework's action covers legislation and policies that fall under those areas where the Member States have transferred competences to the EU. This framework also carries out tasks with regard to the implementation of the Convention by EU institutions in their capacity as

[524] G. de Beco, *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe* (Regional Office for Europe of the UN High Commissioner for Human Rights, 2014).
[525] Code of Conduct, para. 13.
[526] Council Press release 15491/12, Luxembourg 29 October 2012.
[527] Fifth Disability High Level Group, Report on the Implementation of the UN Convention on the rights of persons with disabilities (May 2012).

Public Administration. The specific rules and behaviours that affect those EU institutions and bodies involved in the EU independent mechanism to implement the CRPD will now be analysed. This study can be approached from two perspectives. Firstly, it aims at analysing the EU institutional balance and the role performed by EU institutions into the CRPD's implementation process. Secondly, it seeks to assess the efficiency of the EU governance system for the promotion, protection and monitoring of disability rights.

4.1 The Commission's experimentalist approach



The Commission is fully integrated in the EU independent mechanism to promote, protect and monitor the CRPD. Informal meetings and soft policy instruments characterise the Convention's promotion within the EU. The Commission mainly supports mutual learning and exchange of good practices through events and stakeholder's engagement.[528] It releases reports, disseminates information and organises training. In particular, the Commission has the duty, in cooperation with its Disability High Level Group, to prepare an annual report on the implementation of the Convention in the Member States and the EU. The report provides for a detailed analysis of the implementation of CRPD articles and statistical information on disability in the EU. The report systematically refers to and uses the Convention as a benchmark. It refers to legislative measures adopted under the scope

[528] European Commission, Directorate-General Justice, Directorate D: *Equality, Setting-up the EU framework prescribed by article 33.2 of the UN convention on the rights of persons with disabilities* (12 January 2012).

of the CRPD and contributes to delineating a clear picture of the status of persons with disabilities in the EU.

Importantly, during the preparation of the report, the focal point constantly consults all the relevant stakeholders, including Members States within the Council Working Group on Human Rights. Furthermore, the DHLG's meetings are open to EU-level civil society organisations (CSOs) and Disabled People's Organisations (DPOs). The crucial interactions between the Commission and NGOs are also reinforced by the financial support provided to civil society organisations, in particular disabled persons' organisations that promote and raise awareness of the Convention. Stakeholders' involvement and mutual learning are also achieved through the annual conference that celebrates European Day of Persons with Disabilities on the 3rd December. Moreover, the Commission organises trainings for legal practitioners and policy makers, arranging information sessions on the UNCRPD for staff, setting up an annual Work Forum among all concerned actors at EU level, in the Member States and from civil society and DPOs.[529]

This context underscores the prevalence of mechanisms that reflect the experimentalist architecture of the CRPD and the fundamental principles of good governance adopted by the Commission in the White Paper. This "soft" model is integrated by the traditional powers of the Commission, which may initiate an infringement procedure according to Article 258 TFEU.[530] The Commission may intervene where a Member State has failed to fulfil their Treaty obligations.[531] This means that the Commission can ensure compliance with the Convention and monitor Members States' legislation in situations where they are implementing EU law. So far, the Commission has systematically encouraged the development of tools to share good practice and the participation of all relevant stakeholders in the

[529] *Ibid.*
[530] Art. 258 TFEU "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union".
[531] M. Mendrinou (1996) Non-compliance and the European Commission's role in integration, 3 *Journal of European Public Policy* 1.

process of promoting and monitoring the CRPD at EU level. The role of the European Parliament will now be discussed in order to identify to what extent it is contributing to the CRPD's implementation.

4.2 The European Parliament and the protection of disability rights

The European Parliament participates to the EU independent mechanism required by Article 33 CRPD, but it lacks adequate structures to monitor, promote and protect the Convention in the EU. The function to protect the CRPD is performed by the EP's Committee on Petitions (PETI) in its capacity by hearing petitions and analysing issues of non-compliance.[532] Indeed, according to Article 227 TFEU:

> "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly".

The right of petition is a fundamental right of EU citizens and represents a simple means of contacting the institutions with a request or complaint. The petition must be related to an area falling within the sphere of activity of the EU and concern the petitioner directly. The PETI has the authority to provide non-judicial remedies, table questions to the Council and Commission, issue report and resolutions. The PETI does not coordinate the work between national CRPD mechanisms and the UN's Committee. However, it is empowered to receive complaints concerning EU law before their submission to the UN's Committee. According to the Parliamentary Rules of Procedures, the petition may take the form of a request arising from a general need, an individual grievance or an application to the European Parliament to take a position on a matter of public interest.[533] In this regard, any

[532] Directorate General for Internal Policies Policy Department C Citizens' Rights and Constitutional Affairs Petition, "*The protection role of the Committee on Petitions in the context of the implementation of the UN Convention on the Rights of Persons with Disabilities*" (Brussels, 2015).
[533] Rules of Procedure (Art. 215-218), 8th Parliamentary Term, July 2014.

citizen of the European Union and any natural or legal person residing or having its registered office in a Member State shall have the right to address a petition to the Parliament, individually or in association with other citizens or persons.[534]

The PETI's work is highly linked with the other EU institutions. The Committee may request assistance from the Commission in the form of information on the application and documents relevant to the petition. The Committee may ask also the President to forward its opinion or recommendation to the Commission, the Council or the Member State authority concerned for action or response.[535] Against this background, it is worth noting that the Committee does not have the competence of overruling competent legal authorities and imposing binding remedies.[536] Despite that, in 2015 the Committee received a significant amount of petitions regarding disability rights and contributed to improve the protection of persons with disabilities at the EU level.

The Parliament congratulated the Committee on the work it undertaken in relation to petitions received on issues related to disability.[537] It noted that considerable efforts have been made to ensure the successful launch of the EU framework under the terms of Article 33 of UN CRPD and recognised the willingness of the Committee to continue to support this activity. Moreover, in the 2015 report, the Parliament highlighted the necessity to adequately resource the European Union Framework in line with the requirements of the Convention.[538] The Parliament called for enhancing the capacity of the Committee on Petitions and its Secretariat in order to fulfil its protection role. To this end, it proposed "the establishment of a designated officer responsible for the processing of disabilities-related issues".[539] The Parliament also emphasised the need for further efforts and action on behalf

[534] *Ibid*, Art. 215.
[535] *Ibid*, Art. 216(6).
[536] Directorate General for Internal Policies Policy Department C Citizens' Rights and Constitutional Affairs Petition, "*The protection role of the Committee on Petitions in the context of the implementation of the UN Convention on the Rights of Persons with Disabilities*" (Brussels, 2015), p. 22.
[537] European Parliament, Report on the activities of the Committee on Petitions 2013 (A7-0131/2014).
[538] European Parliament, Report on the activities of the Committee on Petitions 2014, 10 December 2015, A8-0361/2015.
[539] *Ibid*, para. 22.

of the Committee in the protection of people with disabilities, such as actions directed to promote the swift ratification of the Marrakesh Treaty.

The establishment of a specific officer dealing exclusively with disability issues would facilitate and improve the CRPD's protection in the EU. Indeed, petitioners cannot always directly present their cases to the Committee on Petitions because of the lack of meeting time and of human resources at the Committee Secretariat. In addition, the new designated officer should support the use of video-conferencing, or of any other means enabling petitioners and persons with disabilities to become actively involved in the work of the Committee on Petitions. In doing so, the EU would comply with Article 13 CRPD that aims to ensure effective access to justice for persons with disabilities, through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants in all legal proceedings. To conclude, it may be said that the appointment of a specific body dedicated to the protection of persons with disabilities will simplify and clarify the functioning of the EU independent monitoring framework.

4.2.1 *The PETI's main tasks and achievements*

The PETI's contribution to the effective improvement of rights of persons with disabilities has been particularly relevant. For instance, Dan Pescod (British), on behalf of the European Blind Union (EBU) and the Royal National Institute of Blind People (RNIB), presented Petition 0924/2011 relating to the access for blind people to books and other printed products. The petition promoted accession to the Marrakesh Treaty, an international copyright agreement that aims at facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled.[540] PETI examined the petition and invited the Parliament's President to formally contact the Council and the Commission in order to accelerate the procedure of accession to the Treaty by the EU. It also proposed to submit an Oral Question to Plenary and requested a meeting with the Commissioner of

[540] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disable, Word Intellectual Property Organization, WIPO (June 27, 2013).

the Internal Market and Service.[541] As a consequence, the Treaty was successfully signed by the EU and Member States in 2014, but the negotiations for its ratification are still in deadlock.

However, on 28 January 2016, the European Parliament, with regard to the petitions from EU citizens with print disabilities, and particularly Petition 924/2011, released a motion for a resolution on the ratification of the Marrakesh Treaty.[542] The Parliament's motion underlines "that seven EU Member States have formed a minority block which is impeding the process of ratifying the Treaty" and calls "on the Council and the Member States to accelerate the ratification process, without making ratification conditional upon revision of the EU legal framework or the decision of the Court of Justice of the European Union". Importantly, the Parliament recalls Articles 24 and 30 of the UN CRPD, which set out the rights of persons with disabilities to education, without discrimination and on the basis of equal opportunity, while ensuring that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

PETI plays a remarkable role in the EU framework for the promotion of disability rights. It does not have the competence to provide judicial remedies and the effectiveness of its work depends upon the intervention of other institutional actors. Yet it has contributed to increase the awareness of disability rights in the EU and constitutes an effective channel to exercise pressure on the main EU institutions. As such, in this context, civil society organisations and individuals have the possibility to perform lobbying and advocacy activities to ensure that public authorities understand and support their cause. Indeed, the most significant petitions have been supported by NGOs and civil society organisations

[541] Directorate General for Internal Policies Policy Department C Citizens' Rights and Constitutional Affairs Petition, "*The protection role of the Committee on Petitions in the context of the implementation of the UN Convention on the Rights of Persons with Disabilities*" (Brussels, 2015), p. 29.
[542] European Parliament, Motion for a Resolution, pursuant to Rule 216(2) of the Rules of Procedure on the ratification of the Marrakesh Treaty, based on petitions received, notably Petition 924/2011, 28.1.2016 (2016/2542(RSP).

engaged in public campaigns for combating stereotypes, prejudices and harmful practices relating to persons with disabilities.[543]

4.2.2 *The Disability Intergroup of the European Parliament*

The European Parliament's monitoring duties are also carried out by the Disability Intergroup, an informal group of Members of the European Parliament (MEPs) who are interested in promoting the disability policy in their work at EU and national level. Their priorities are defined by the Intergroup Bureau, which meets regularly to approve the work programme of the Disability Intergroup. The new work programme for 2015-2016 outlines the importance of adopting the proposed EU Directive implementing the principle of equal treatment, aiming to extend the protection against discrimination beyond employment, to social protection and healthcare, social advantages, access to and supply of goods and other services available to the public, including housing and education.[544] The Disability Intergroup called for a revision of the Europe 2020 strategy in order to tackle the dramatic employment rate of persons with disabilities (under 50%) who are excluded from EU economic and social policies.[545] The 2020 Strategy is not in line with the fundamental provisions of the European Disability Strategy and the UN CRPD, as it does not set out specific indicators related to 80 million Europeans with disabilities.

The Disability Intergroup ensures that the European Parliament agenda takes into account disability and contributes to awareness-raising of the UN CRPD. However, the Disability Intergroup is not financially supported by the European Parliament and is not involved in its official activities. It represents a voluntary initiative to promote an exchange of views between political groups from all

[543] Directorate General for Internal Policies Policy Department C Citizens' Rights and Constitutional Affairs Petition, "*The protection role of the Committee on Petitions in the context of the implementation of the UN Convention on the Rights of Persons with Disabilities*" (Brussels, 2015), p. 40.
[544] Disability Intergroup of the European Parliament, Work Programme 2015-2016.
[545] European Commission, Europe 2020 A strategy for smart, sustainable and inclusive growth, Brussels, 3.3.2010, COM (2010) 2020. The Europe 2020 strategy promotes smart, sustainable and inclusive growth. The aim is to improve the competitiveness of the EU whilst maintaining its social market economy model and improving significantly the effective use of its resources.

Member States. This body does not formally express the Parliament views and has no capacity to effectively influence the legislative process. It seems that the Disability Intergroup, acting on behalf of the EP, does not have sufficient tools to fulfil the delicate function of monitoring the CPRD. Indeed, according to Rule 34 of the European Parliament Rules of Procedure, individual members may form "Intergroups" to hold informal exchanges of views on specific issues across different political groups and promote contact between members and civil society. Nonetheless, such groupings "may not engage in any activities which might result in confusion with the official activities of Parliament or of its bodies". This means that the Disability Intergroup is an informal forum for policy dialogue with a limited political mandate; it therefore cannot properly monitor the CRPD on behalf of the Parliament. The analysis will now focus on the European Ombudsman's mandate and procedure within the EU independent mechanism.

4.3 The European Ombudsman

The European Ombudsman is an independent and impartial body that investigates complaints about maladministration in EU institutions, bodies, offices, and agencies.[546] According to Article 228 TFEU, the Ombudsman is empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies. Only the Court of Justice of the European Union, when acting in its judicial role, does not fall within the Ombudsman's mandate. The Ombudsman examines such complaints and reports on them. Moreover, it has the duty to "conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him directly or through a Member of the European Parliament" (Art. 228(2) TFEU). In case the Ombudsman finds an instance of maladministration, he shall refer the matter to the institution, body, office or agency concerned, who shall have a period of three months

[546] L. C. Reif, *The Ombudsman, Good Governance, and the International Human Rights System* (Brill, Leiden, 2004).

to inform him of their views. The Ombudsman shall then forward a report to the European Parliament and the institution, body, office or agency concerned. The work of the Ombudsman may be said to be characterised by the use of soft law instruments which do not give rise to substantive legal rights.[547] Despite that, on 4 July 2007, the Ombudsman reviewed the actions undertaken by the EU Commission in the area of disability rights to assess whether or not they were consistent with its legal obligations.

4.3.1 *The Ombudsman's own-initiatives*

The Ombudsman opened an own-initiative inquiry concerning the integration of persons with disabilities by the Commission with the purpose of verifying that these citizens were not discriminated against in their relations with the institution.[548] To this end, the Ombudsman started an open and transparent dialogue with all relevant stakeholders such as individuals with disabilities, representative groups, and other ombudsmen at national and regional levels. The Ombudsman stated that the Commission made significant progress to integrate people with disabilities. In particular, the employment of persons with disabilities by all EU institutions respects the prohibition of non-discrimination on grounds of disability and the duty to provide reasonable accommodation.

Another significant Ombudsman's own initiative inquiry focused on the European Schools' treatment of disabled children with special educational needs (SEN children).[549] The Ombudsman regretted that the financial support and assistance given to officials with disabled family members was insufficient and encouraged the adoption of a new policy based on inclusion. It pointed out that the integration of SEN children should comply with the obligation to provide inclusive, non-discriminatory education

[547] M. Smith, *Centralized Enforcement, Legitimacy and Good Governance in the EU* (Routledge, New York 2010). See also, P. G. Bonnor, The European Ombudsman: a novel source of soft law in the European Union (2000) 1 *European Law Review* 39.
[548] Decision of the European Ombudsman on own-initiative inquiry OI/3/2003/JMA concerning the European Commission, 04 Jul 2007.
[549] Integration of children with disabilities by the European Schools, Case OI/3/2003/JMA, Opened on 19 Nov 2003 - Decision on 04 July 2007.

for all enshrined in the UN CRPD. The Ombudsman concluded that the Commission should try to strengthen its own role in the European Schools' SEN policy.

Recently, the EU Ombudsman intervened in relation to the use of the European Structural and Investment Fund (ESI) that are the European Union's main investment policy tool.[550] It stated that a Member State used ESI Funds to renovate a large institution housing disabled persons. By contrast, the ESI Funds are meant to finance the closure of such institutions and the transition to community-based living.[551] The Ombudsman found a violation of Article 19 CRPD, which promotes the deinstitutionalisation of persons with disabilities. The Ombudsman emphasised that the Commission should dissuade Member States from breaching fundamental rights when their activities are funded by the EU cohesion policy. To this end, the Ombudsman proposed guidelines for improvement to the Commission. For instance, the Commission should initiate infringement proceedings against a Member State if its actions in the framework of the cohesion policy amount to a violation of EU law. The suspension of funding constitutes an effective deterrent in case of violations of specific provisions of Regulation 1303/2013. In addition, it recommended the creation of a clear and transparent framework to encourage the participation of civil society in monitoring and implementing the ESI Funds. In this regard, the Commission should launch an online platform to involve small civil society organisations, report abuses of Funds and Charter violations and submit complaints. The Ombudsman also suggested to setting up mixed working parties composed by Commission representatives, Member States and civil society.[552]

[550] Decision of the European Ombudsman closing her own-initiative inquiry OI/8/2014/AN concerning the European Commission, 11 May 2015.
[551] Art. 9(9) Regulation (EU) no 1303/2013 of the European Parliament and of the Council of 17, December 2013. See also, G. Quinn and S. Doyle, Taking the UN Convention on the Rights of Persons with Disabilities Seriously: The Past and Future of the EU Structural Funds as a Tool to Achieve Community Living (2012) 9 *The Equal Rights Review* 69.
[552] Paragraph 48 (VIII) of Decision of the European Ombudsman closing her own-initiative inquiry OI/8/2014/AN concerning the European Commission, 11 May 2015.

4.3.2 *The Ombudsman's limited mandate*

As noted above, the Ombudsman does not have the power to impose binding measures on EU institutions in order to correct an instance of maladministration. Maladministration includes non-compliance with EU law and human rights obligations under the Charter of Fundamental Rights.[553] The Ombudsman performs its protection tasks through investigation of complaints and own-initiative inquiries. Ombudsman's proposals aim at achieving friendly solutions and persuading EU institutions to improve their administrative practices. However, if an institution fails to comply with his recommendations, the Ombudsman can criticise it publicly or if the issue is serious enough, he may release a special report to the Parliament.[554] By contrast, the Ombudsman cannot start any procedures with regard to the implementation of EU law by Member States and cannot evaluate the compatibility of EU legislation with the Convention. In this context, the Ombudsman's role is limited, because his mandate does not reflect those strategic requirements of Article 33(2) CRPD concerning the promotion and protection of the Convention. The Ombudsman's contribution is more significant in the process of monitoring the CRPD, as his specific reports and initiative inquiries show the extent to which the EU institutions and agencies are compliant with the Convention. The monitoring component is crucial to foster accountability and strengthen the capacity of EU institutions to fulfil their commitments. An overview of the functions of the EU Agency for Fundamental Rights will now be offered as this Agency has a key role to play with respect to Article 33 CRPD.

[553] Decision of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties 94/262/ECSC. See also Linda C. Reif, Ombudsman institutions and Article 33(2) of the United Nations Convention on the Rights of Persons with Disabilities, (2014) 65 University of New Brunswick Law Journal 213.
[554] European Ombudsman, Strategy for the mandate, September 2010. See also Lisa Waddington, Reflections on the Establishment of a Framework to Promote, Protect and Monitor Implementation of the UN Convention on the Rights of Persons with Disabilities (Article 33(2) CRPD) by the European Union, Maastricht Faculty of Law Working Paper 2011/3.

4.4 The monitoring role of the EU Agency for Fundamental Rights

The Fundamental Rights Agency (FRA) was established by Council Regulation 168/2007 in order to provide the EU relevant institutions, bodies, offices and agencies and its Member States with assistance and expertise relating to fundamental rights when implementing EU law.[555] The FRA cannot perform any functions to protect disability rights as it lacks the competence to investigate or examine complaints. Nevertheless, it represents a vital part of the EU independent mechanism to promote and monitor the CRPD's implementation. The Agency can formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing EU law. It also publishes an annual report on fundamental rights issues for highlighting examples of good practice. The FRA has the duty to develop a communication strategy and encourage dialogue with civil society in order to raise public awareness of fundamental rights.[556] In doing so, FRA's activities may be essential for promoting disability rights and raising awareness of the CRPD.

It is not however clear if the Convention falls under the scope of the FRA's action.[557] The founding Regulation 168/2007 lays down that the Agency should, in its own work, refer to those fundamental rights within the meaning of Article 6(2) TEU, including the European Convention on Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights. Article 6 TEU underlines the EU fundamental rights *acquis* and does not make reference to the CRPD's conclusion. Notwithstanding, the Convention's ratification by the EU and the recent CJEU's judgements signal that the CRPD forms an integral part of the EU fundamental rights *acquis*, as it prevails over instrument of EU

[555] Art. 2 of Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.
[556] *Ibid*, Art. 2 (h).
[557] L. Waddington, Reflections on the Establishment of a Framework to Promote, Protect and Monitor Implementation of the UN Convention on the Rights of Persons with Disabilities, Article 33(2) CRPD by the European Union (Maastricht Faculty of Law Working Paper 2011/3), p. 8.

secondary law.[558] As a consequence, the CRPD may be considered as the benchmark of the FRA's mandate. This means that FRA should refer in its monitoring work to those fundamental rights enshrined by the CRPD.

Moreover, it is noteworthy to recall Article 26 of the EU Charter of Fundamental Rights, which provides that the "Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community". To the same extent, the Multiannual Framework 2013-2017 for the FRA establishes that the Agency shall carry out its tasks in the area of discrimination based on disability.[559] To this end, the FRA has to collect, analyse and disseminate reliable and comparable information and data. It has to develop methods and standards to improve the comparability, objectivity and reliability of data at European level.[560]

The development of standards and data constitutes a fundamental tool to evaluate and monitor national practice and legislation with regard to disability rights. For instance, the FRA developed human rights indicators on Article 19 CRPD in order to allow EU Member States and all stakeholders to apply the indicators in practice. This project aims at assessing the fulfilment of Article 19 of the CRPD on the transition from institutional care to community-based support for persons with disabilities.[561] According to the OHCHR's guidelines, a human rights indicator is "specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights". [562]

[558] See Joined Cases C-335/11 and C-337/11, para. 29: "primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements".
[559] Art. 2(g) of Council Decision No 252/2013/EU of 11 March 2013 establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights.
[560] Art. 4 (a) (b) Regulation (EC) No 168/2007.
[561] Indicators available online at: http://fra.europa.eu/en/project/2014/rights-personsdisabilities-right-independent-living/indicators
[562] Office of the United Nations High Commissioner for Human Rights (OHCHR), Human rights indicators A Guide to Measurement (New York 2012).

The FRA's indicators cover important topics such as non-discrimination, reasonable accommodation, accessibility of support services, budget allocation, complaints and redress mechanisms, awareness-raising measures and training. They are fundamental part of a systematic process to implement, monitor and realise rights. They may contribute to assess violations of international and national human rights norms by national and EU tribunals, civil society organisations and policymakers. In this regard, the FRA's work is necessary to carry out those tasks enshrined in Article 31 of the CRPD that require the collection of statistical and research data. It may be argued that the FRA's role will be more effective in promoting and monitoring the CRPD, because its current methods of operation reflect the key features of the open method of coordination (continuous feedback, reporting, peer reviews, revising practices and gathering data). The involvement of the European Disability Forum in the EU monitoring mechanism will be discussed below.

4.5 The European Disability Forum's challenge to open up the EU decision-making process

The inclusion of the European Disability Forum (EDF) in the EU independent monitoring system symbolises the most remarkable aspect of the governance mechanism adopted by the EU according to Article 33 CRPD. Indeed, the designation of EDF complies with the international requirement to involve civil society in the monitoring process and it represents a concrete application of new governance paradigms. EDF is the main disability rights organisation in Europe, and has lobbied for achieving fundamental political objectives, such as the clause on combating discrimination on the grounds of disability in Article 13 of the Amsterdam Treaty of the EU and the inclusion of the concept of reasonable accommodation in the Framework Equality Directive.

EDF plays a central role for promoting the Convention's implementation through awareness-raising campaigns, media activities and organisations of public events. EDP conducts those specific tasks that are expressly required by Article 8 CRPD on awareness-raising. For instance, in 2011 EDF launched the "Freedom of Movement" campaign to promote the removal of all barriers for persons

with disabilities in the EU. This campaign was supported by the publication of the 'Freedom Guide', which identified the environmental and attitudinal barriers within the EU preventing persons with disabilities from the full participation in social life. Crucially, EDF raises awareness throughout society to foster respect for the rights and dignity of persons with disabilities. It encourages all organs of the media to portray persons with disabilities in a manner consistent with the CRPD and aims at combating stereotypes, prejudices and harmful practices. To this end, it initiates effective public awareness campaigns to develop positive perceptions towards persons with disabilities, in particular with regard to their contribution to the workplace and the labour market. EDF organises awareness-training programmes concerning the rights of persons with disabilities in order to strengthen technical knowledge and advocacy capacity of civil society organisations.[563] An overview of the European Disability Forum's participation throughout the EU policy chain will now be given.

EDF is responsible for monitoring the EU's implementation of the CRPD. This strategic duty implies the examination of legislative proposals and policy of the EU and the assessment of development or retrogression of rights of persons with disabilities in the EU legal context. In this regard, EDF is involved in a continuous dialogue with the EU institutions. On 14 January 2016, the EDF Executive Committee met the bureau of the Disability Intergroup of the European Parliament in order to discuss various issues, such as the role of the Parliament in the follow up of the UN's Concluding Observations on the Rights of Persons with Disabilities, the impact of austerity measures on persons with disabilities and the situation of refugees and migrants with disabilities. The MEPs of the Disability Intergroup endorsed the EDF's proposal to hold a 4th European Parliament of Persons with Disabilities in 2017, co-organised by EDF and the European Parliament.

The European Parliament of Persons with Disabilities is an event to mainstream at EU level the situation of the most vulnerable groups of individuals as women, youth, children and people with

[563] Commission Staff Working Document, Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union, Brussels, 5.6.2014, SWD (2014) 182 final, p. 49.

disabilities. To mainstream implies that the needs of disadvantaged people must be taken into account in the design and implementation of all policies and measures. This forum is shaped according to the rules governing the plenary sitting of the European Parliament. The event involves the participation of delegates from organisations representing persons with disabilities (DPOs) who vote a resolution calling on the EU institutions, the Member States, social partners, civil society and other stakeholders to take appropriate steps towards the CRPD's implementation. It aims at reinforcing the link between national representatives of organisations of persons with disabilities and EU decision-makers. Such an event may constitute a considerable contribution to EU governance as it helps the European Parliament to individuate work priorities and develop long-term policy perspectives. Moreover, on 17 February 2016, EDF participated in the meeting of the European Parliament's Employment Committee focusing on the implementation of the UN's recommendations to the EU on the promotion of rights of persons with disabilities.[564] The European Ombudsman and the FRA, as members of the EU Monitoring Framework along with EDF and the Parliament, also took part in the debate. EDF emphasised that the UN's recommendations set out a clear roadmap and a list of actions to be adopted in line with the CRPD: review of the European Disability Strategy, revision of EU laws and adoption of the European Accessibility Act. This meeting represents another decisive moment of the constructive relationship between the Parliament and EFD, because MEPs have the opportunity to share and exchange ideas with key EU bodies and the European disability movement. Thus, EDF can effectively monitor to what extent the EU will address the UN's recommendations and implement the UN CRPD.

This framework has enabled the European Parliament and its committees to gradually improve the quality of their policy deliberation through regular consultation and public hearings with EDF. The need of reinforcing the culture of consultation and dialogue is a central guideline of the Commission's

[564] Committee on the Rights of Persons with Disabilities Concluding observations on the initial report of the European Union, adopted by the Committee at its fourteenth session (17 August-4 September 2015).

White Paper. The principle of good governance indeed demands measures to consolidate the consultative process in the European Parliament, given its role in representing the citizens. In particular, public hearings are expressly required to enhance dialogue between Parliament and civil society. The consultative process within the Parliament and its committees with regard to the CRPD's implementation demonstrates the emergence of a strong interplay between the European Parliament and EDF.

The fundamental rules, processes and behaviours that characterise the way in which powers are exercised by the EU actors within the independent framework have been described above. The analysis of the EU system created in accordance with Article 33 CRPD to implement the Convention has been done through the lens of the experimentalist approach to governance. An overview of the main weaknesses and positive aspects of the governance mechanism designed by the EU will now be offered. The final objective is to assess whether the open method of coordination, as ideal model of experimentalist governance, is appropriate for implementing the Disability Convention.

4.6 Focal point and coordination mechanism: innovative or inefficient practices?

The European Commission has been appointed both as a focal point (Art. 33.1) for implementation and as a mechanism for monitoring the CRPD's implementation (Art. 33.2). As a focal point, the Commission is responsible for the implementation of the Convention on behalf of the EU and for the Union examination by the Committee on the Rights of Persons with Disabilities. It ensures cross-sectoral coordination within its own institution, between all EU bodies and with the Member States.[565]

To achieve *internal* coordination, the Inter-Service Disability Group involves all relevant Directorates-General in order to share policy initiatives between different departments. This internal mechanism is crucial to ensure dialogue between DGs and facilitate the fulfilment of common

[565] European Parliamentary Research Service, EU Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) European Implementation Assessment (Brussels 2016).

goals.[566] For instance, the overall aim of the European Disability Strategy 2010-2020 is to boost the participation of people with disabilities in society and in the European economy, notably through the Single Market.[567] However, the achievement of these ambitious objectives may be compromised by the coordination mechanism developed within the Commission's Inter-Service Group on Disability. This practice seems necessary to put together departments that work in different areas, but further and stronger coordination is needed to implement the Disability Strategy in a systematic way. Indeed, the Inter-Service Group's role is mainly consultative and is not informed by clear procedures for the adoption of common proposals or policy instruments. The Commission, as a focal point, will face significant obstacles to effectively achieve cross-sectoral coordination within its own institution. It may be argued that the lack of a permanent and specific department dealing with the Disability Strategy and CRPD's implementation will slow down the EU action.

In a different manner, a *vertical* coordination mechanism has been informally developed to coordinate all EU bodies and the Member States. The vertical coordination mechanism should foster related actions in different sectors and at different levels, but the EU has not formally nominated any bodies to carry out this duty.[568] Despite that, two main actors are involved in this process: the Council Working Party on Human Rights (COHOM) and the Disability High Level Group (DHLG). They ensure coordination between the EU institutions and Member States. It is worth noting that this mechanism combines two opposite governance models: a traditional hierarchal approach and an experimentalist paradigm. The COHOM is part of the Council of the European Union and only includes representatives of Foreign Ministers of the MS. By contrast, the DHLG promotes participation of national focal points and civil society organisations along with Member States representatives. The coexistence of a classic procedure of coordination with a new mode of

[566] E. Flynn, *From Rhetoric to Action: Implementing the UN Convention on the Rights of Persons with Disabilities* (Cambridge University Press, 2011), p. 72.
[567] The Commission has identified eight main areas for action: Accessibility, Participation, Equality, Employment, Education and training, Social protection, Health, and External Action.
[568] European Parliamentary Research Service, *EU Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) European Implementation Assessment* (2016), p. 11.

governance may consolidate the effectiveness of the vertical mechanism. This hybrid system represents a good practice to develop cooperation between EU and Member States taking into account views of European DPOs and NGOs. To conclude, the *de facto* vertical mechanism that links EU institutions, national governments and private actors may be considered as highly innovative and efficient. It mixes bottom-up political dynamics with top-down structures in order to facilitate political coordination in a delicate sensitive area.

The following section will now evaluate the functioning of the governance mechanism designated to implement the CRPD and will offer a critical analysis of the EU independent framework.

4.7 Lights and shadows in the EU independent framework

Each member of the EU independent framework shares the common mission to promote, protect and monitor the Convention's implementation. Every member exercises its functions in line with the specific powers and competences conferred by the EU Treaties. All relevant EU institutions, agencies and bodies of the governance mechanism shaped their functions and behaviours to put into practice the requirements of Article 33 CRPD.

The Commission's role encompasses distinctive features of the new EU modes of governance. The procedures that affect the Commission's work are characterised by the existence of structured channels for enhancing feedback and civil society's engagement. The continuous consultation of organised civil society within the DHLG represents a positive element of the mechanism to independently implement the CRPD. Consultation and dialogue not only contribute to foster transparency and accountability of EU institutions, but also help the Commission in developing long-term policy perspectives.[569] By contrast, a weak point of this governance mechanism is that the

[569] O. de Schutter, Europe in Search of its Civil Society (2002) 8 *European Law Journal* 198.

Commission has no authority to release formal recommendations to the Member States in case of non-compliance with the CRPD or Disability Strategy's objectives.

For instance, according to the European Employment Strategy (EES), the most interesting example of the OMC, the Commission has the power to issue recommendations for policy change when the Member States' performances are not in line with the EES guidelines.[570] The EES emerged in the 1990s when the EU Member States decided to set up common objectives and targets for employment policy. Currently, the Member States and the Commission agree on the establishment of initial goals, general guidelines and a series of indicators to promote the creation of more and better jobs in the EU.[571] In this context, national governments have the duty to submit National Reform Programmes (NRPs) that are analysed by the Commission. Crucially, based on the assessment of the NRP, the Commission publishes a series of Country reports and issues country-specific recommendations. Neither the recommendations nor the guidelines are legally binding, but they are part of a comprehensive strategy to share information and good practices.[572] The NRPs circulate between the Member States to exchange feedback. At the same time, indicators ensure transparent data and reliable benchmarks to assess positive results. This system assures a multilateral surveillance mechanism based on the involvement of the Member States, the Commission and the EU Council. This model may be also appropriate with regard to the CRPD's implementation in the EU. The Commission independently monitors to what extent the Member States apply EU legislation falling under the scope of the CRPD. In doing so, the Commission prepares an annual report on the application of the Convention in the Member States and the EU, but it lacks the competence to make recommendations for policy changes. To effectively accomplish the objectives of the CRPD, the EU should reform the monitoring system. It should provide a clear monitoring mechanism based on the

[570] D. M. Trubek and L. G. Trubek, Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination (2005) 11 *European Law Journal* 343.
[571] The employment guidelines, proposed by the Commission, are finally approved by the EU Council.
[572] D. M. Trubek and L. G. Trubek, Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination (2005) 11 *European Law Journal,* p. 349.

submission of National Reform Programmes by national governments and the final analysis by the Commission for compliance with the Disability Strategy 2010-2020. The Commission should not only publish a series of Country and Union reports, but also release specific recommendations to promote legislative improvements.

Lastly, it is worth noting that the Concluding Observation of the UN CRPD Committee points out the incompatibility of the Commission's dual role, as EU focal point (Article 33.1 CRPD) and a member of the Monitoring Framework (Article 33.2 CRPD).[573] Indeed, according to the 'Paris Principles', the representatives of the Government departments should participate in the deliberations only in an advisory capacity.[574] Therefore, the Commission should be removed from the mechanism to monitor the CRPD's implementation. To comply with the Committee's recommendation, the Commission has recently expressed its intention to withdraw from the EU independent framework.[575] The exclusion of the Commission will be detrimental to the effective functioning of the monitoring system as it is the only body capable to protect citizens via its power to start infringement procedures against Member States breaching EU law. The Commission's role should be reinforced by taking into consideration the main rules and procedures that inform the open method of coordination. The Code of Conduct should confer on the Commission the power to release Country reports or recommendations. In this way, Member States will be encouraged to follow the guidelines agreed with the EU institutions in order to avoid negative peer reviews. The Parliament's participation within

[573] Committee on the Rights of Persons with Disabilities Concluding observations on the initial report of the European Union, adopted by the Committee at its fourteenth session (17 August-4 September 2015).
P. 77: "The Committee recommends that the European Union take measures to decouple the roles of the European Commission in the implementation and monitoring of the Convention, by removing it from the independent monitoring framework, so as to ensure full compliance with the Paris Principles, and ensure that the framework has adequate resources to perform its functions. The Committee also recommends that the European Union consider the establishment of an interinstitutional coordination mechanism and the designation of focal points in each European Union institution, agency and body".
[574] Principles relating to the Status of National Institutions (The Paris Principles) adopted by General Assembly resolution 48/134 of 20 December 1993.
[575] During a public hearing at the European Parliament on the CRPD implementation held on 15.10.2015, the Commission representative underlined that 'the Commission prepares for the withdrawal of the Framework as a member'. See also European Parliamentary Research Service, EU Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) European Implementation Assessment (2016).

the EU governance system will now be evaluated and it will be shown that the Parliament is seeking to acquire a major role in the CRPD's implementation.

4.7.1 *Is the European Parliament marginalised?*

The European Parliament mainly performs its duty to implement the CRPD through political debates, informal meetings and public hearings. It examines legislative and policy documents for assessing their compliance with the CRPD and carries out several awareness-raising activities. The Parliament is represented by PETI, the Committee on Employment and Social Affairs (EMPL), the Committee on Civil Liberties, Justice and Home Affairs (LIBE).

As previously noted, PETI has the authority to protect the rights of persons with disabilities and monitor the CRPD's implementation. Despite the non-binding nature of its decisions, PETI is effectively contributing to the enhancement of disability rights. It does so by hearing petitions from any EU citizens concerning EU legislation and reporting on the petitions it receives. Its competences are in line with the "soft" policy mechanisms of the open method of coordination. However, its role might be improved to better achieve the aims of Article 33 CRPD.

In primis, the appointment of a specific officer responsible for dealing with legal issues related to disability is strongly required in order to strengthen the Committee's protection role. Secondly, PETI should release an annual report on the main disability issues stemming from the petitions to facilitate the identification of possible legal solutions. Thirdly, a systematic and periodic exchange of information should be set up between PETI and national monitoring institutions. The lack of coordination between PETI and national mechanisms constitutes a critical point of the functioning of the governance system to implement the CRPD. In this regard, the interplay between EU and domestic actors is essential to carry out the sensitive task to protect the rights of persons with disabilities. PETI may potentially address the CRPD's broad scope, but it needs a comprehensive and enhanced capacity to perform its protection role.

With the exception of PETI, the European Parliament does not have any formal structure to implement the CRPD. Nevertheless, the Employment Committee is crucially promoting the implementation of the UN's recommendations to the EU and the role of the European Parliament in this context. The European Parliament is currently drafting a report on the UN's recommendation in order to tackle crucial issues such as the adoption of the Accessibility Act and the effects of austerity measures on persons with disabilities.[576] EDF and members of civil society are constantly involved in public hearings and events organised by the Employment Committee. This report is a spontaneous initiative of the Parliament and symbolises a remarkable starting point to lead efforts for the CRPD's implementation. Importantly, the Parliament calls for the EU to ratify the Optional Protocol to the Convention and urges a cross-cutting review of EU legislation and funding programmes to complying fully with the CRPD. It also asks the Commission to update the declaration of competence in light of the Concluding Observations, to review the European Disability Strategy and to develop a comprehensive EU CRPD strategy with a clear timeframe, benchmarks and indicators.[577]

The Parliament is gradually emerging from the institutional shadows by means of the political action of a proactive group of MEPs and claims a greater involvement in the EU governance.[578] It is important to underline that the Parliament is excluded from the official drafting of the EU periodic report to the UN Committee on the Rights of Persons with Disabilities, which is still under the exclusive Commission's competence. Moreover, the Parliament does not participate in any procedures of the *de facto* vertical and horizontal coordination system. In the light of this backdrop, it may be said that the European Parliament's role has been marginalised within the EU independent framework.

[576] Committee on Employment and Social Affairs, Draft Report on the implementation of the UN Convention on the Rights of Persons with Disabilities, with special regard to the Concluding Observations of the UN CRPD Committee (2015/2258(INI)).
[577] *Ibid*, p. 6.
[578] Significantly, MEPs Helga Stevens (ECR, BE) and Martina Anderson (GUE/NGL, UK) hosted, on 27 January 2016, the European Parliament's Public Hearing focusing on the UN's recommendations to the EU on how to better promote the rights of 80 million people with disabilities.

This institutional scenario may jeopardise the adequate implementation of the CRPD at European level. The Parliament has always worked to mainstream the rights of persons with disabilities pushing for the adoption of the Horizontal Equal Treatment Directive. For this reason, the European Parliament should be more influential both in the coordination system and the implementation process. To this end, the Commission should invite the Parliament to take full part in the debate concerning the implementation of the Convention within the High Level Group on Disability.[579] In this way, the Parliament would be involved in the fundamental mechanism that ensures vertical coordination between the EU and Member States. The Parliament might also give a relevant contribution to the internal coordination among the EU institutions. Currently, the EU mechanism does not provide for an inter-institutional coordination mechanism and the European Parliament may fill this governance gap. Good coordination among all EU institutions is however an essential condition to achieve the ambitious objectives of the Convention. Lastly, the Code of Conduct should be revised in order to expressly update the Parliament's role in the EU independent framework.[580] It may be recommended to formally recognise the Parliament's task to provide an annual report on the implementation of the CRPD by the EU and to present a periodic report to the UN Committee.

This *excursus* on the procedures adopted by the EU to face the challenges posed by the CRPD's ratification highlights some controversial features of the EU institutional framework and governance. In particular, the mechanism established according to Article 33 CRPD brings about the obscuration of the European Parliament, the closer body to the European citizens and civil society organisations. Nonetheless, the Parliament is taking a leading role in the Convention's implementation through the political initiatives of the Committee on Employment and Social Affairs. The adequate nature of the

[579] DHLG includes only the European Commission, the Member States, Norway, the Council of Europe, EU-level NGOs, including organisations of people with disabilities.
[580] Paragraph 14 of the Code of Conduct says: "At the request of the Council, a Member Stare or the Commission. The arrangement will be reviewed, taking into account of experience gained during its operation".

existing policy arrangements to address the rights of persons with disabilities at European level will now be examined.

4.7.2 *Is the open method of coordination appropriate?*

The governance system required by Article 33 CRPD employs those typical mechanisms and procedures of the experimentalist approach. The EU has responded to this challenge by crafting a governance model that mirrors the open method of coordination. In 2010, the European Commission adopted the European Disability Strategy 2010-2020 in order to pursue its objectives by actions in eight priority areas. The approach to achieve these shared goals is based on voluntary political cooperation. Member States still retain a significant portion of autonomy in the adoption of national policies to accomplish the EU objectives.[581] It would seem that the Member States are quite reluctant in conferring political competence to the European Union in a sensitive area such as disability law that affects different legal sectors (equality law, access to justice, legal capacity and accessibility). However, Member States are supported by the Commission's expertise and guidance in implementing strategic objectives. This soft coordination system has already been applied in specific policy fields such as employment and growth, social protection and social inclusion, but never with regard to equality issues.[582] As a result, this new scenario raises several concerns in relation to the feasibility of the open method of coordination in the disability sector.

4.7.2.1 *An overview of the reporting mechanism*

The main weakness of the existing governance mechanism affects the reporting and benchmarking process. Peer review and reporting are central elements of the OMC. Indeed, governments should provide national plans to the Commission concerning the situation of persons with disabilities in their domestic system. To this end, Member States started to report on disability by means of the National

[581] M. Priestley, Disability Policies and the Open Method of Coordination (2012) 3 *European Yearbook Disability Law* 7.
[582] *Ibid*, p. 14.

Reform Programmes (NRPs). The MS were asked to follow the guidelines offered by the DHLG in a discussion paper on "Disability mainstreaming in the new streamlined European social protection and inclusion processes".[583] The DHLG, as a Commission expert group, encouraged to mainstream disability into social protection and social inclusion, taking into account the EU Charter of Fundamental Rights and the CRPD. The DHLG outlined important strategic and key policy priorities such as overcoming discrimination, increasing integration of people with disabilities in the labour market, tackling disadvantages in education, enhancing assistance to families with disabled members, ensuring decent housing and improving access to quality services that are accessible and affordable. Notably, national reports have not mainstreamed disability in a systematic and coherent way. Several countries have not addressed the fundamental framework of guidance given by the DHLG. Some NRPs failed to report on the implementation progresses made by the country or paid insufficient attention to core European policy concepts.[584] The majority of States did not provide clear and analytical evidence with regard to the implementation of disability policies. In doing so, the Commission could not carry out any rigorous assessment of the rights of persons with disabilities at national level.

The launch of the EU Disability Strategy 2010-2020 and the entry into force of the CPRP slightly improved the reporting system. Disability strategies and action plans have been developed by some Member States to highlight areas which will be at the forefront of government action. For instance, in June 2011, Germany released a National Action Plan that covers crucial issues such equality, social and political participation of persons with disabilities, empowerment and self-help. To the same extent, the Latvian government adopted the Guidelines for the Implementation of the CRPD 2014–2020 and Denmark launched a new National Action Plan on disability in October 2013. By contrast,

[583] Disability High Level Group Work Programme 2006-2007, Disability High Level Group Discussion Paper. Subject: Disability mainstreaming in the new streamlined European social protection and inclusion processes

[584] According to Mark Priestley's research, disability had limited or no visibility in the 2008 National Reform Programmes of several countries: Austria, Bulgaria, Finland, France, Germany, Lithuania, Malta, Poland and Romania. See Mark Priestley, Disability Policies and the Open Method of Coordination, p. 19.

Greece, the Netherlands, Poland and Slovenia failed to release any national disability action plan or strategy. Most of the national disability plans does not take into consideration specific disability indicators or does not develop reliable data. Therefore, EU institutions cannot promote the exchanging of good practices and benchmark progresses by Member States. This context reveals that the reporting mechanism should be more incisive in order to involve all the EU Member States and improve the OMC's effectiveness. National plans should not merely contain political guidelines, but should identify clear legislative actions and enforcement mechanisms. In this respect, recommendations for enhancing the EU governance mechanisms will be offered below.

4.7.2.2 *Enhancing the EU Disability Strategy: some suggestions*

Frequently, the OMC has not been considered a proper tool to accelerate the process of EU integration.[585] Indeed, it is not based on a comprehensive system of sanctions and the concrete achievement of its objectives depends upon the extent to which national plans are implemented by governments. The adoption of non-binding recommendations and atypical acts do not ensure the uniform application of EU rules in Member States. Moreover, fundamental EU institutions such as the European Parliament and the CJEU have a secondary role. The Court of Luxembourg does not have a structural position in protecting rights under the CRPD, as it can intervene only in response to specific cases submitted by individuals. However, the establishment of an independent framework reflecting the experimentalist governance approach results from the international obligation under Article 33 CRPD. The absence of hard sanctioning mechanisms should not constitute an obstacle in a governance architecture that incentivises reciprocal learnings.[586] As a consequence, the reporting

[585] V. Hatzopoulos, Why the Open Method of Coordination is Bad For You: A letter to the EU (2007) 13 European Law Journal 309. See also S. Sciarra, Experiments in the open method of coordination: measuring the impact of EU employment policies (2011) *Rivista Italiana di Diritto del Lavoro* 475.
[586] C. M. Radaelli, *The Open Method of Coordination: A new governance architecture for the European Union* (Swedish Institute for European Policy Studies, 2003), p. 52.

methods and the coordination mechanisms of the OMC should be enhanced to mainstream disability in the EU.

Firstly, the DHLG, along with the Parliament's contribution, may relaunch the objectives of the Disability Strategy 2010-2020 developing precise timeframes and key performance indicators. Such instruments will be useful for identifying good practices and for measuring countries' performances in the area of disability. In this regard, the European Agency for Fundamental Rights (FRA) has already provided human rights indicators with regard to the right of political participation of people with disabilities. As a member of the EU independent framework, it may assist the Commission and the Parliament in adopting new policy strategies and indicators. The formulation of clear performance indicators by the EU institutions can facilitate the benchmarking process and improve the report mechanism. By doing so, the Member States will be encouraged to elaborate statistics and data on the impact of their policy measures. At the same time, the EU institutions will have the necessary tools to share good practices and evaluate the Member States' performance.

Secondly, the EU governance system designed to implement the CPRD should introduce procedures to penalise non-cooperation by the Member States. The Commission does not have the duty to formally release specific recommendations that emphasise poor performances. On the contrary, the Commission's recommendations to comply with EU guidelines and indicators constitute the main "soft" sanction of the OMC. Recommendations will spur the Member States to participate in the reporting mechanisms in order to avoid negative publicity.[587] Moreover, this procedure will urge the non-compliant State to follow positive models and propose legislative reforms. The OMC does not provide tangible coercion mechanisms and infringement procedures to punish non-implementers.[588] However, 'peer pressure' and 'naming and shaming' by the EU Commission may represent soft

[587] D. M. Trubek and L. G. Trubek, Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination, 11 *European Law Journal*, p. 357.
[588] M. López-Santana (2006) The domestic implications of European soft law: framing and transmitting change in employment policy, 13 *Journal of European Public Policy* 481.

procedures to foster learning and improvement mechanisms at domestic level.[589] No formal sanctions should be adopted against those Member States whose performances do not comply with agreed-upon standards. Instead, Commission recommendations addressed to individual Member States may constitute powerful tools to influence national policy discourses.[590]

Thirdly, the EU independent framework reveals an excessive fragmentation. Unreasonable decentralisation may bring about poorly defined responsibilities and unclear competences.[591] It may be said that the EU governance mechanisms should be simplified in order to avoid the coexistence of multiple EU bodies with overlapping functions. To this end, precise duties and responsibilities should be conferred to the EU actors involved in the open method of coordination. The OMC is not seen as a panacea to implement the CRPD, but the improvement of certain mechanisms may contribute to facilitate the achievement of the Disability Strategy objectives. In doing so, Member States will remain the main responsible in a sensitive area where they are still reluctant to lose important portions of legislative power.

An outline of the key recommendations to improve the EU governance architecture is offered below:

- The Commission's powers should be strengthened to increase the effectiveness of the monitoring and reporting system. In case the Commission will definitively abandon the independent framework, a reform of the Code of Conduct would be needed to expressly recognise soft procedures to sanction non-compliant behaviour by Member States;
- The Parliament should play a leading role with regard to the EU external relations and internal policies. On one hand, the Parliament should be in charge of preparing

[589] M. Buch, The Open Method of Coordination as a 'two-level game (2008) 36 *Policy & Politics* 21.
[590] Fritz W. Scharp, *The European Social Model: Coping with the Challenges of Diversity*, MPIfG Working Paper 02/8, July 2002.
[591] G. Majone, The European Commission: the limits of Centralization and the Perils of Parliamentarization (2002) 15 *Governance: an International Journal of Policy, Administration and Institutions* 375.

the annual report on the CRPD's implementation by the EU to the UN Committee. The Parliament has actively facilitated interactions and constructive dialogues between the EU and the CRPD Committee. The European Parliament regularly organises events and public hearings to discuss the CRPD's review process and the list of issues released by the CRPD Committee. For instance, in February 2016, the Parliament promoted an exchange of views concerning the CRPD's implementation, within the Committee on Employment and Social Affairs, with the participation of all the members of the EU Independent Framework. Furthermore, the Parliament drafts on a regular basis reports and resolutions with regard to the Convention's implementation and the concluding observations of the CPRD Committee. It may be said that the Parliament embodies the political capacity to act as the main contact point for the purpose of CRPD reporting. On the other hand, the Committee on Employment and Social Affairs, acting on behalf of the Parliament, should be acknowledged as the central coordinator between EU institutions, EU agencies and civil society. It has a strong competence in the field of the rights of persons with disabilities and is promoting several political initiatives to improve their legal protection at EU level;

- The EU Ombudsman and PETI should formally monopolise the duty to ensure the implementation of the CRPD through an independent officer responsible for disability legal cases;
- The Agency for Fundamental Rights (FRA) should acquire an active role in the monitoring process. Its functions are highly relevant to support the work of the Commission in measuring the impact of the Disability Strategy 2010-2020. Indicators and data developed by FRA should be used to systematically benchmark and evaluate national strategies concerning the rights of persons with disabilities;

- The European Disability Forum (EFD) is identified as the main NGO involved in the promotion of disability rights in the EU. It participates in all the main meetings and procedures of the EU independent framework. The central challenge is to improve the quality of the EU policy deliberation ensuring regular consultation and public hearings with civil society. Its contribution may also be significant in assisting the EP in drafting reports to the UN Committee and monitoring the CRPD's implementation.

Proposal to upgrade and simplify the EU independent framework to implement the CRPD

PROTECTION	**PROMOTION**	**MONITORING**
EU Ombudsman/ EP's Petition Committee	**European Disability Forum**	**Agency for Fundamental Rights**
• **duty to protect the rights of persons with disabilities and ensure the implementation of the CRPD** • **establishment of an independent officer responsible for disability legal cases**	• public campaigns and awareness activities to **promote** the CRPD's implementation • promotion of the rights of persons with disabilities **within the EU decision-making process**	• **development of indicators and data** to systematically benchmark and **monitor** national strategies concerning the rights of persons with disabilities
		Commission

		• responsible for setting up **EU objectives, timeframes and policy strategies** • power to release **recommendations** in case of non-compliant behaviours by the Member States
		European Parliament
		• **External Action: annual report** to the UN Committee to **monitor** the CRPD's implementation in the EU • presentation of **periodic reviews** to the UN Committee • **Internal Action: inter-institutional coordinator** among all EU institutions
		European Disability Forum
		• **examination of EU legislative proposals** and policy • leading the **4th European Parliament of Persons with Disabilities** in 2017 • regular meetings with the EP's Employment Committee.

CHAPTER 5

A COMPARATIVE APPROACH TO THE DUTY TO PROVIDE REASONABLE ACCOMMODATION: US AND CANADA

1. Introducing the legal framework

This chapter will adopt a comparative legal approach in order to analyse the implementation of the duty to provide reasonable accommodation in the United States and Canada. To this end, a brief overview of the judicial understanding of the concept of disability will also be given.

The UN CRPD encompasses the obligation to guarantee and protect the employment rights of people with disabilities in the open labour market. Article 27 of the Convention states that:

> "States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labor market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation".

The duty to provide reasonable accommodation represents an essential requirement to effectively enhance the rights of persons with disabilities in the workplace. The concept of reasonable accommodation is specifically defined by Article 2 of CRPD. It includes:

> "All the necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" (Art. 2 CRPD).

It is worth noting that the concept of reasonable accommodation was for first time introduced in the American legal system by the 1972 Equal Employment Opportunity and then it was also embraced by Canadian courts to deal with religious diversity.[592] However, in both countries, the duty to provide

[592] E. Bribosia, J. Ringelheim, I. Rorive, Reasonable Accommodation for Religious Minorities: A Promising Concept for

reasonable accommodation was merely related to aspects of religious observance and practice without any reference to disability. The obligation to provide reasonable accommodation to persons with disabilities in the workplace was expressly introduced by the Americans with Disabilities Act (ADA) only in 1990. Since then, the concept of reasonable accommodation has been enshrined in several legal instruments at international, European and national level.[593] For instance, Canada introduced the duty to provide reasonable accommodation with an express reference to persons with disabilities within the Employment Equity Act in 1995. Furthermore, the EU adopted the obligation to accommodate persons with disabilities under Article 5 of the Directive 2000/78 by means of a "transatlantic borrowing" from the ADA.[594]

The US has been selected because it was the first Western country to adopt a comprehensive piece of legislation (the ADA) which addresses the duty to accommodate persons with disabilities in the workplace. However, the US is yet to ratify the CRPD. President Obama signed the treaty in 2009 showing the intention to be bound by its legal obligation. Nonetheless, the CRPD's ratification became a problematic political issue. Indeed, the final bill obtained only 61 votes for and 38 against in the Senate, five votes short of the two-thirds majority needed for ratification. By contrast, Canada lacks an overarching piece of legislation that specifically focuses on the rights of persons with disabilities, but it signed the Convention on the day it opened for signature and ratified the CRPD in March 2010.

The purpose of this chapter is to stress positive and negative practices with regard to the judicial interpretation of the concept of disability and the duty to accommodate persons with disabilities. In doing so, this chapter will compare a country which has ratified the CRPD (Canada) with one which has not (United States). The aim is to identify the appropriate modification and adjustments for

European Antidiscrimination Law? (2010) 17 *Maastricht Journal European and Comparative Law* 137.

[593] D. Ferri, L'accomodamento ragionevole per le persone con disabilità in Europa: dal Transatlantic Borrowing alla Cross-Fertilization (2017) 2 *Diritto Pubblico Comparato ed Europeo* 381.

[594] G. Quinn, E. Flynn, Transatlantic Borrowings: The Past and Future of EU Non-discrimination Law and Policy on the Ground of Disability (2012) 60 *American Journal of Comparative Law* 23.

fostering the rights of persons with disabilities in the workplace. To the same extent, it seeks to assess the legal impact of the obligation to accommodate on employers.

2. US disability law

In 1990, Congress passed the Americans with Disabilities Act (ADA) which prohibits discrimination in employment, public accommodation and government services.[595] The ADA's enactment was hailed as the most radical and inspiring change affecting disability rights at the international level.[596]

The ADA's adoption may be considered as the final outcome of the increasing pressure exercised by disability rights activities in the 1960s. In this respect, the "independent living movement" for the promotion of disability rights represented a fundamental segment of the American movement for disability rights. It has its roots in Berkley (California) and contributed to founding the first Center for Independent Living in the USA.[597] Disability rights activists were strongly encouraged by the positive results obtained by African-American and Women's civil rights campaigners. They successfully fought to achieve the adoption of the Civil Rights Act of 1964, which prohibited discrimination on the basis of race, religion, national origin and gender. Similarly, in the 1970s, disability advocates started to lobby Congress for equal treatment, equal access and equal opportunity for persons with disabilities and marched on Washington to include civil rights for persons with disabilities into the 1972 Rehabilitation Act. The wave of protests gradually influenced the Congress' political agenda who passed several pieces of legislation to tackle disability discrimination, such as the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act of 1975. The Rehabilitation Act of 1973 (Section 504) introduced equal opportunity for employment within the federal government and prohibited discrimination on the basis of either

[595] Americans with Disabilities Act of 1990, Pub. L. No 101-336, 104 Stat. 327.
See E. F. Emens, Disabling Attitudes: U.S. Disability law and the ADA Amendments Act (2012) 60 *The American Journal of Comparative Law* 205.
[596] Quinn G., & Flynn, E., "Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability" (2012) 60 *American Journal of Comparative Law* 23.
[597] V. Perju, Impairment, Discrimination, and the legal construction of Disability in the European Union and the United States (2010) 2 *European Yearbook of Disability Law* 280.

physical or mental disability. The Education for All Handicapped Children Act of 1975, which was renamed in 1990 to the Individuals with Disabilities Education Act (IDEA), focused on the inclusion of children with disabilities into regular classes and the rights of parents to be involved in the educational decisions affecting their children.

After nearly three decades of lobbying activities, the ADA was enacted in 1990 to ensure equal treatment and equal access of people with disabilities to employment opportunities and to public accommodations. It is noteworthy that the ADA was approved with the bi-partisan political support of Republicans and Democrats; President George Bush described the act as "the world's first comprehensive declaration of equality for people with disabilities".

2.1 The Americans with Disabilities Act (ADA)

Despite the enthusiasm surrounding the ADA's adoption, Courts applied a strict interpretation of the concept of disability and narrowed the ADA's mandate.[598] The ADA indeed enshrined a "social" definition of disability covering not only those individuals who have an impairment that substantially limits a major life activity, but also those persons who are "regarded as having such an impairment". The ADA adopted a flexible and broad definition of disability aiming at curbing society's stereotypes related to persons with disabilities. Under the ADA, the term "disability" means, with respect to an individual:

> (i) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (ii) a record of such an impairment;
>
> (iii) being regarded as having such an impairment.

[598] S. F. Befort, Let's try this again: the ADA Amendments Act of 2008 attempts to reinvigorate the "Regarded as" prong of the statutory definition of disability (2010) 4 *Utah Law Review* 993.

In doing so, the ADA embraced a social model of disability according to which disability implies an interaction between individual impairment and social barriers. This approach has positively included under the ADA's protection those individuals who meet the requirement of "being regarded as having such an impairment".[599] The "regarded as" prong significantly extended the ADA's personal scope in order to erase disability discrimination and employment decisions based on a *stereotyped* or *misrepresented* perception of disability. In this respect, the Equal Employment Opportunity (EEOC) released an Interpretative Guidance stating that "an individual rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under this part of the definition of disability".[600] The ADA introduced promising legal provisions to improve the protection of persons with disabilities. The Supreme Court however rejected the EEOC's guidance and clarified the circumstances under which an individual may fall under the protection of the "regarded as" prong. The sceptic view of the Supreme Court will be briefly examined below.

2.2 The judicial backlash: *Sutton v United Air Lines*

The decision in *Sutton v. United Air Lines* symbolised the emergence of a sort of judicial backlash against the ADA. The Court held that the plaintiffs did not fall under the ADA's protection, because their impairment could be mitigated by the use of glasses and as such it was not substantially limiting of any major life activity.[601] The case began with the petition of two sisters, Karen and Kimberly Sutton, who suffered from myopia. They applied for a job as commercial airline pilots with United Air Lines, but their application was rejected by United Air Lines. The respondent's justification was that the uncorrected visual acuity of the petitioners did not meet the employer's minimum vision requirements. As a consequence, they filed suit under the ADA, which prohibits covered employers from discriminating against individuals on the basis of their disabilities.

[599] ADA 1990, U.S.C 12102(2)
[600] EEOC's interpretive guidance, C.F.R. pt. 1630, app., at 398 (1994) (clarifying 29 C.F.R. section 1630.2(l).
[601] *Sutton et al. v. United Air Lines* (1999) 527 U.S. 471.

The Court ruled that the determination of whether an individual is substantially limited in a major life activity should take into account the effects of mitigating measures such as assistive or prosthetic devices. An individual who is currently functioning well due to mitigating measures will not be considered as a person with disabilities under the ADA. This interpretation appears controversial because whether a person has a disability shall be determined without regard to the availability or use of mitigating measures, such as reasonable accommodations, prosthetic devices, medications or auxiliary aids. This ruling had therefore the effect to exclude from the ADA's protection several millions of individuals with diabetes, seizures disorders, heart disease and psychiatric conditions.[602]

Moreover, the Court stated that a claimant does not fall under the ADA's definition of disability that covers who is "regarded as having such impairment" unless he or she sufficiently alleges to be regarded as substantially limited in the major life activity of working. In doing so, the Court required that "an employer mistakenly believes that an individual has a substantially limiting impairment" or that "an employer mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities".[603] In both cases, the personal impairment must be perceived as limiting one or more major life activities. The Court negatively assumed that the inability to perform a single or particular job does not constitute a substantial limitation in the major life activity of working. According to this view, the petitioners failed to adequately allege that their poor eyesight is regarded as an impairment that substantially limits them in the major life activity of working. They merely alleged that the respondent regarded their poor vision as precluding them from holding positions as a global airline pilot.[604] The claimants therefore did not demonstrate that the respondent perceived them as having a substantially limiting impairment preventing them from performing a broad class of tasks beyond the particular job of pilot. As a result, the Court found that an employer's

[602] C. Center and A. J. Imparato, Redefining Disability Discrimination: A Proposal to Restore Civil Rights Protections for All Workers (2003) 14 *Stanford Law & Policy Review* 321.
[603] *Sutton*, 119 S. Ct. at 2150.
[604] *Sutton*, 527 U.S at 494.

vision requirement does not reflect a belief that the petitioners' vision substantially limits their major life activity.

This ruling violates the underlying rationale of the ADA to deal with society's accumulated myths and fears concerning disability. The Court indeed demanded a high standard of what is regarded as "major life activities", which includes the inability to work in a *broad class* of jobs. As a consequence, individuals mistakenly perceived as having an impairment that merely jeopardises a single job performance cannot fall under the ADA's protection. The Court emphasised a restrictive interpretation of the "regarded as" prong at the expense of a universalistic approach that aims at ensuring protection for a broad category of individuals.[605]

2.3 *Toyota Motor Manufacturing, Kentucky, Inc. v Williams*

In 2002, the Supreme Court further narrowed the ADA's definition of disability in the case of Toyota Motor Manufacturing Kentucky, Inc. v Williams.[606] It held that the Sixth Circuit decision erred in qualifying as "disabled" an assembly line worker with carpal tunnel syndrome and related impairments under the first prong of the definition of disability. By contrast, the Sixth Circuit ruled that the claimant's impairments substantially limited her major life activity of performing manual tasks, such as gripping of tools and repetitive work with hands. The Supreme Court underlined that Sixth Circuit did not apply the proper standard in determining that the respondent was disabled under the ADA. The Sixth Circuit focused its analysis only to a limited class of manual tasks and "failed to ask whether respondent's impairments prevented or restricted her from performing tasks that are of central importance to most people's daily lives".[607] The Supreme Court stated that the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most individuals' daily lives. In this case, manual tasks unique to a particular job were regarded as not necessarily

[605] K. Barry, Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights, 31 *Berkeley Journal of Employment & Labour Law* 203 (2010).
[606] *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. (2002).
[607] *Ibid* at 196-198.

important parts of most people's lives; occupation-specific tasks were considered as having only limited relevance to the manual task inquiry. As a result, the Court stated that the plaintiff's impairments precluded her from carrying out isolated manual task performances and she was therefore not substantially limited in a major life activity. The claimant was indeed still able to perform her personal hygiene and carry out personal or household chores. In a nutshell, the Court required that an impairment must substantially obstructs also *non-working* activities of the individual in order to trigger the ADA's coverage.

It may be said that the standard adopted by the Supreme Court to fall under the category of 'disability' is excessively challenging. The requirement of an "impairment that substantially limits a major life activity" deprived the ADA of its original purpose to tackle discrimination against persons with disabilities in such critical areas as employment. It is difficult to justify the Supreme Court's legal reasoning because it places a heavy burden of proof on the employee to show the existence of a substantial limitation to non-working activities. It seems evident that the ADA has not triggered the expected transformative impact on the life of persons with disabilities.[608] The Supreme Court expressly introduced a "demanding standard" to assess whether an individual can be considered as having a disability.[609] This approach considerably limited the protection of persons with disabilities and brought about significant legal obstacles to address disability discrimination.[610] Following the Court's interpretation, over 97% of ADA employments claims have been rejected by federal courts. The restrictive approach of the Supreme Court may be due to the fact that the ADA expressly provided higher standards of protection in comparison with the previous Rehabilitation Act by introducing new and broader legal concepts such as the social model of disability and the duty to provide reasonable accommodation in the workplace.[611] American courts did not fully recognise the civil rights model

[608] M. Diller, Judicial Backlash, the ADA, and the Civil Rights Model (2000) 21 *Berkeley Journal of Employment & Labour Law* 19
[609] *Toyota Motor Mfg, Ky v. Williams*, 534 U.S. 184 (2002).
[610] R. Colker, The Mythic 43 Million Americans with disabilities (2007) 49 *William and Mary Law Review* 1.
[611] M. Diller, Judicial Backlash, the ADA, and the Civil Rights Model (2000) 21 *Berkeley Journal of Employment & Labour Law*, p. 22.

underlying the new piece of legislation. By doing so, they showed a conservative approach towards the implementation of a substantive model of equality that requires affirmative action and different treatments for persons with disabilities. Consequently, in 2006, Congress started to work on a new piece of legislation with the view of overriding the restrictive Court's approach. The main improvements introduced by Congress will be briefly analysed below.

2.4 The ADA Amendments Act of 2008

In order to restore and reinvigorate the broader scope of the ADA's mandate, Congress was forced to approve the ADA Amendments Act of 2008 (ADAAA). Section 2 of ADAAA lays down that "Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled". In addition, Congress recognised that "the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect". In doing so, Congress confirmed that the ADA sets out a clear and exhaustive national mandate for the elimination of discrimination against individuals with disabilities.[612] The ADA amendments however have not affected the substantive content of the duty to provide reasonable accommodation in the workplace.

Title I on 'employment' prohibits discriminations with regard to the job application procedures, the hiring, advancement, discharge of employee and job training, referring to those employers who are engaged in an industry with at least fifteen employees. It is important to point out that Title I also obliges employers to guarantee reasonable accommodation unless such accommodation would pose

[612] N. L. Jones, Overview and essential requirement of the Americans with disabilities act (1991) 64 *Temple Law Review* 471.

an undue hardship on the operation of the business. The category of reasonable accommodation includes:

> (i) making existing facilities used by employees readily accessible to and usable by individuals with disabilities,
>
> (ii) job restructuring, modifying work schedules, reassignment to a vacant position; acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

By contrast, an "undue hardship" is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation. Indeed, according to Sec. 101 (10B) of ADA, in determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

> (i) the nature and cost of the accommodation needed under this Act;
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Against this background, it may be said that the central purpose of ADA is to ensure equal employment opportunities for employees with disabilities, employment non-discrimination and

reasonable accommodation.[613] The extent to which ADAAA has changed the legal definition of disability and the personal scope of the obligation to accommodate will now be analysed.

2.4.1 *The "regarded as" prong*

The most important development achieved by the ADAAA affects the "regarded as" prong of the disability definition. The ADA, as amended, retained the previous definition of disability but provided significant changes to reduce the demanding bar to demonstrate a substantial limitation on major life activity. Interestingly, the bill removed from the third "regarded as" prong the requirement to prove that an individual has, or is perceived to have, an *impairment that substantiality limits a major life activity*. Indeed, according to Paragraph 3 of Section 4 ADA, an individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under the ADA, because of an actual or perceived physical or mental impairment *whether or not* the impairment limits or is perceived to limit a major life activity. This new provision specifically rejects the standard enunciated by the Supreme Court in *Toyota* in accordance with the terms "substantially" and "major" need to be interpreted strictly to create a demanding standard for qualifying as disabled.

In addition, the amendments further clarify that an impairment that substantially limits one major life activity "need not limit other major life activities in order to be considered a disability".[614] The determination of whether an impairment substantially limits a major life activity shall be made "without regard to the ameliorative effects of mitigating measures" such as medication, medical supplies, equipment, use of assistive technology; reasonable accommodations or auxiliary aids or services.[615] These rules expressly overcome the Supreme Court's finding in *Sutton* that whether an

[613] A. Mayerson, Title I – Employment provisions of the Americans with disabilities Act (1991) 64 *Temple Law Review* 499.
[614] Paragraph (4) Section 4 ADAAA; Rules of construction regarding the definition of disability.
[615] *Ibid.*

impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures.

The ADAAA extended the scope of the statute's protection to a broader class of individuals with disabilities. By contrast, the category of individuals who are entitled to reasonable accommodation has been restricted. Employers no longer have the duty to provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who is only "regarded as" disabled.[616] This limitation has been defined by Congress as an "acceptable compromise" given the expectation that *real* persons with disabilities would be covered under the first prong of the ADAAA's disability definition.[617] This reasoning is adequate with regard to those individuals who are mistakenly perceived as disabled without having any kind of impairment.[618] However, persons who have an impairment that does not substantially limit their major life activities may still need reasonable accommodation to perform a specific job. The American legal framework may be criticised because the ADAAA enlarged the category of persons who are regarded as disabled, but reduced the legal guarantees in favour of them by eliminating the duty on employers to provide reasonable accommodation. The particular nature of reasonable accommodation under US disability law will now be examined in order to investigate how the Supreme Court interpreted the accommodation requirement.

2.4.2 *Reasonable accommodation*

The failure to provide reasonable accommodation for a "qualified individual with a disability" constitutes employment discrimination under the ADA. The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of

[616] Section 6 Rules of construction, ADAAA.
[617] Congressional Record - Senate. s8347. September 11, 2008.
[618] S. F. Befort, Let's try this again: the ADA Amendments Act of 2008 attempts to reinvigorate the "Regarded as" prong of the statutory definition of disability (2010) 4 *Utah Law Review*, p. 1023.

the employment position that such individual holds or desires.[619] In general, an accommodation is any change in the work environment that enables a worker with disability to enjoy or exercise employment rights and opportunities on an equal basis with others. There are two main categories of reasonable accommodations. The first one includes accommodations involving "hard costs" or concrete out-of-pocket expenses and requires alteration of the physical workplace, such as ramping stairs to accommodate the needs of individuals who use a wheelchair.[620] The second category encompasses "soft costs" accommodations demanding alteration of the way a job is performed, such as personnel policy or practice.[621] The EEOC however suggested that majority of accommodations do not entail significant costs for small businesses and reported an average cost of $240.00.[622]

Under the ADA, a claim of disability discrimination has to follow a precise and interactive procedure. An employee must prove that he or she has a disability and that he or she is qualified to perform the essential functions of the job, with or without reasonable accommodation. Then, the plaintiff has to demonstrate that he or she has suffered adverse employment action on the grounds of disability. By contrast, once the plaintiff makes a facial showing that reasonable accommodation is possible, the burden of production shifts to the employer. The latter is then engaged in an "interactive process" to assess the individual limitation and determine the possible reasonable accommodation. The term 'reasonable accommodation' thus "includes the employer's reasonable efforts to assist the employee and to communicate with the employee in good faith".[623] The employer can also decline the request and show that it is unable to accommodate the employee.[624]

[619] ADA, Subchapter I – Employment, Sec. 12111. Definitions.
[620] M. A. Stein, The law and economics of disability accommodations (2003) 53 Duke Law Journal 88.
[621] *Ibid*, p. 88.
[622] The Equal Employment Opportunity Commission, The Americans with Disabilities Act: A Primer for Small Business, 2004.
[623] *Mengine v. Runyon*, 114 F.3d 415, 416 (3d Cir. 1997).
[624] *Beson v. Nw. Airlines*, Inc. 62 F.3d 1108, 1112 (8th Cir. 1995).

The interpretation of the accommodation requirement stands out as a problematic issue under the ADA.[625] The restrictive approach adopted by the Supreme Court with regard to the definition of disability compromises the implementation of the reasonable accommodation provision. Plaintiffs have to prove that they are "disabled enough" to fall under the definition of disability and seek a reasonable accommodation, but not "too disabled" to be regarded as unqualified for the job.[626] Employers may therefore assert that the individual impairment prevents the claimant from carrying out specific job functions.[627] This means that only a narrow category of individuals is "disabled just right" to invoke the ADA's protection.[628] Several cases have been merely decided by looking at the plaintiff's characteristics. This approach achieved the irrational outcome of considering "a person disabled enough to be fired from a job, but not disabled enough to challenge the firing".[629]

Moreover, once an applicant shows that he or she is disabled enough under the ADA, he or she faces another challenge. According to the ADA, the employer does not have the duty to provide a reasonable accommodation that would impose an "undue hardship" on the functioning of the employer's business. The concept of undue hardship is highly vague and the lack of legal precedents jeopardises the identification of those accommodations that are reasonable. American courts' rulings mainly focused on the issue of disability at the summary judgement phase and abstained from adopting a comprehensive definition of reasonable accommodation or undue hardship. It may be argued that the imposition of a high bar for classifying a person as disabled had a negative impact on the right to reasonable accommodation for workers with disabilities. The unique judgement of the

[625] J. E. Matejkovic & M. E. Matejkovic, What is reasonable accommodation under the ADA? Not an easy answer; rather a plethora of questions (2008-2009) 28 *Mississippi College Law Review* 67.
[626] M. A. Stein, A. Silvers, B. A. Areheart & L. P. Francis, Accommodating Every Body (2014) 82 *The University of Chicago Law Review* 690.
[627] *Ibid*, p. 713.
[628] B. A. Arehear, When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma (2008) 83 *Indiana Law Journal* 183.
[629] See R. O'Brien, *Crippled justice: the history of modern disability policy in the workplace* (The University of Chicago Press, 2001), p. 109.

Supreme Court on reasonable accommodation will now be analysed and it will be shown how this concept has been understood in the American legal framework.

2.5 The Supreme Court's controversial reasoning in *US Airways, Inc v. Barnett*

The Supreme Court provided guidance to identify the construction of the ADA's reasonable accommodation in the case of *US Airways, Inc v. Barnett*.[630] The Court's decision offered significant guidelines to assess the scope of this obligation and the potential development of ADA jurisprudence.[631]

The case involved Robert Barnett who worked for US Airways as cargo handler. He injured his back and was transferred to a less physically demanding mailroom position. His new position later became open to seniority-based employee bidding under US Airways' seniority system, and employees with greater seniority wanted to apply for the job. US Airways refused his request to accommodate his disability by allowing him to remain in the mailroom, and he lost his job. Mr Barnett then filed suit under the ADA claiming that he was an individual with a disability who was qualified to perform the mailroom job. He contended that US. Air violated the ADA by refusing to provide him with a reasonable accommodation and reassigning him to the mailroom position. The District Court granted the company summary judgement finding that an alteration of the seniority system's rules would result in an "undue hardship" to both US Airways and its non-disabled employees. According to the District Court, the US Air seniority system has been in place for "decades" and governed over 14,000 U.S Air Agents. As a result, the US Air employees were justified in relying upon the policy.[632] By contrast, the Ninth Circuit reversed this decision holding that US Air's seniority policy does not automatically constitute a bar to reassignment under the ADA. The Circuit held that the seniority

[630] *US Airways, Inc v. Barnett*, 535 U.S. 391 (2002).
[631] S. F. Befort, Reasonable accommodation and reassignment under the Americans with Disabilities Act: answers, questions and suggested solutions after U.S. Airways, Inc. v. Barnett (2003) 45 *Arizona Law Review* 931.
[632] *US Airways, Inc v. Barnett* at 394.

system was merely a factor in the undue hardship assessment and that a case-by-case analysis is required to determine whether any particular assignment would constitute an undue hardship.[633]

The Supreme Court was called upon to decide whether "the ADA requires an employer to reassign a disabled employee to a position as a 'reasonable accommodation' even though another employee is entitled to hold the position under the employer's bona fide and established seniority system."[634]

2.5.1 *Does job reassignment amount to reasonable accommodation?*

The Court vacated the Ninth Circuit's decision and concluded that that accommodation was unreasonable because it would have disrupted other employee's expectations of "fair, uniform treatment" under the seniority system.[635] The Supreme Court's majority opinion refused both parties' argumentations embracing an "intermediate view" of the concept of reasonable accommodation.[636]

Firstly, the Court rejected the US Airways' claim that a seniority system always trumps a conflicting accommodation request on the grounds of how the ADA treats workplace "preferences."[637] US Airways argued that the ADA seeks only "equal" treatment for persons with disabilities and does not therefore require an employer to grant any preferential treatment. According to this view, "insofar as a requested accommodation violates a disability-neutral workplace rule, such as a seniority rule, it grants the employee with a disability treatment that other workers could not receive." [638] By contrast, the Supreme Court clarified that "preferences" under the ADA may be sometimes necessary to achieve the Act's basic equal opportunity goal. The Act indeed requires "preferences in the form of reasonable accommodations that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy."[639] The Court pointed out that a

[633] *Ibid*, at 1120.
[634] *Barnett*, 535 U.S. at 395–96.
[635] *Ibid*, at 403-404.
[636] S. F. Befort, Reasonable accommodation and reassignment under the Americans with Disabilities Act: answers, questions and suggested solutions after U.S. Airways, Inc. v. Barnett (2003) 45 *Arizona Law Review*, p. 951.
[637] *Barnett*, 535 U.S. at 397.
[638] *Ibid*.
[639] *Ibid*.

preferential treatment that breaches an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach. The reasonable accommodation requirement implies that employers have the duty to treat employees with disabilities differently (or preferentially) in order to effectively accomplish its intended objective. In doing so, a difference in treatment does not represent *per se* an exception from the ADA's reasonable accommodation mandate.

Secondly, the Court rejected the Barnett's stance according to which the statutory words 'reasonable accommodation' mean only 'effective accommodation'. Barnett argued that reasonable accommodations qualify as those workplace modifications that enable an individual with a disability to perform the essential functions of a position. The plaintiff added that any other view would make the words 'reasonable accommodation' and 'undue hardship' virtual mirror images creating a practical burden of proof dilemma.[640] However, the Court was not persuaded by the Barnett's legal interpretation of 'reasonable' accommodation. Pursuant to the Court's view, the word 'reasonable' does not mean 'effective', but it is the word 'accommodation' that conveys the need for effectiveness. As a consequence, an accommodation could be effective in terms of enabling essential job performance without being reasonable. Moreover, the Court explained that an effective accommodation could be unreasonable because of its impact, not on business operations, but on other co-workers. Lastly, with regard to the burden of proof allocation, the Court held that a plaintiff needs only to show that an accommodation seems reasonable on its face and the defendant then must show 'special circumstances' that demonstrate undue hardship in the particular case. To conclude, the Court stated that the proposed accommodation was not reasonable in the present case as the reassignment conflicted with the seniority system's rules.

[640] *Ibid*, at 400.

2.5.2 *Seniority system' rules and reasonable accommodation requirements*

The Court recognised the importance of seniority to employee-management relation and supported those decisions of lower court's ruling that a seniority system always trumps a request of reasonable accommodation. According to this view, the statute does not require that employers submit proof on a case-by-case basis that a seniority system should prevail. The typical seniority system indeed grants important advantages for employees "by creating, and fulfilling, employee expectations of fair, uniform treatment".[641] These benefits include job security and objective standards for predictable career advancement. As a result, requiring the typical employer to adopt a complex case-specific "accommodation" decision would undermine the employees' expectations of consistent and uniform treatment. Such management decision-making would be inevitable discretionary and violate the rules of a seniority system. Thus, the Court found a conflict between the duty to provide reasonable accommodation under the ADA and the labour goal of restricting employer discretion.[642] This decision underlines that accommodation requirements may bring about arbitrary treatments in the workplace and frustrate employment policies aiming at constraining employer discretion.[643] In this respect, accommodating an individual impairment may not only reinforce employer discretion, but also have a negative impact on non-disabled employees' contractual rights or expectations. However, according to the ADA, the disabled employee is free to show that *under the "special circumstances"* of the case, an exception to the seniority policy would be "reasonable." For instance, the employee would be entitled to claim an exception to the standard application of seniority rules if he showed that "one more departure" from the seniority rules "will not likely make a difference."[644]

The Supreme Court's reasoning clearly privileges labour goals over equal opportunities policies and non-discrimination norms. In doing so, it promotes the adoption of objective workplace policies

[641] *Ibid*, at 404.
[642] M. A. Sapiro, Labor Goals and Antidiscrimination Norms: Employer Discretion, Reasonable Accommodation, and the Costs of Individualized Treatment (2013) 32 *Yale Law & Policy Review* 1.
[643] *Ibid*, p. 39.
[644] *Barnett*, 535 U.S, at 419.

limiting employer's discretion and decision-making. This interpretation may have the positive effect to enhance uniform treatment in the workplace and employees' expectations with regard to employment opportunities. This approach however disregards the ADA's mandate to foster the integration of persons with disabilities in the workplace and jeopardises the statutory goal of ensuring equal opportunity. The same understanding of reasonable accommodation has since been adopted by several courts of appeals. Another example of this judicial interpretation of the reassignment requirement will now be offered.

2.5.3 *The 8th Circuit: a conservative approach*

In *Pam Huber v. Walmart Stores, Inc.*, the Eight Circuit ruled that "the reassignment language merely requires employers to consider on an *equal basis with all other applicants* an otherwise qualified existing employee with a disability for reassignment to a vacant position".[645]

This case originated from the claim of Huber who worked for Wal-Mart as a dry grocery order filler. She had a permanent injury to her right arm and hand; she therefore could no longer perform the essential functions of her job. The parties stipulated Huber's injury is a disability under the ADA and Huber sought, as a reasonable accommodation, reassignment to a router position, which was a vacant and equivalent position under the ADA. Wal-Mart, however, declined the plaintiff's request to be automatically reassigned to the router position. Wal-Mart required the claimant to apply for the router position with other applicants. Ultimately, Wal-Mart denied Huber the router position because she was not the most qualified candidate. As a consequence, Huber filed suit under the ADA, arguing she should have been reassigned to the router position as a reasonable accommodation for her disability. The District Court granted summary judgement in favour of Huber, but the Court of Appeals (Eighth Circuit) concluded that Wal-Mart did not violate its duty, under the ADA, to provide reasonable accommodation.

[645] See *Huber v. Wal-Mart Stores*, Inc., 486 (8th Circuit 2007).

The Eight Circuit's ruling reflects the Supreme Court's finding in *Barnett* as it adopts a restrictive approach according to which the ADA does not include mandatory preference provisions. The Circuit agreed that the ADA "is not an affirmative action statute" because it merely prohibits employment discrimination against qualified individuals with disabilities. The ADA does not demand an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate non-discriminatory policy of the employer to hire the most qualified candidate.[646] Pursuant to this view, the ADA only requires an employee to take into *equal* consideration the employer's request for a reassignment to a vacant position.

It appears evident that policies underlying business interests prevail over legal requirements to accommodate persons with disabilities. To conclude on this point, one may argue that American courts have been reluctant to embrace the civil rights conception of disability enshrined in the ADA and apply the statutory substantial obligation to accommodate.

2.5.4 *The preferential nature of reasonable accommodation*

Case law under the ADA shows that reasonable accommodations implying preferential treatment for persons with disabilities are regarded as affirmative actions. Courts adopted strict standards to apply the duty to provide reasonable accommodation and prevent the ADA from imposing affirmative action provisions. American courts are sceptical with regard to affirmative action laws and the preferential nature of the duty to provide reasonable accommodation. However, the reasonable accommodation requirement should not be automatically associated with the conventional concept of affirmative action.[647] For instance, traditional affirmative actions are often based on pre-designed policies that aim to enhance the inclusion of marginalised minority groups in the labour market.[648] To this end, they set up specific numerical goals to increase the representation of minority groups in

[646] *Ibid*, at 1028-1029.
[647] S. F. Befort and T. H, Donesky, Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both? (2000) 57 *Washington & Lee Law Review* 1045.
[648] *Ibid*, p. 1804.

the workplace. In this respect, affirmative action expressly requires preferring one group over others in order to compensate disadvantages and achieve equality of results.[649] These policies are common in gender and racial anti-discrimination laws that adopt affirmative action such as racial quotas or gender quotas. In contrast, reasonable accommodation under the ADA involves personalised special treatments and does not provide for pre-determined statistical goals or quotas. This duty entails an interactive dialogue between employer and employee in order to individuate the proper accommodation. Reassignment does not apply at the hiring stage, when affirmative action programs are usually highly pervasive. It indeed operates as a "post-hire mechanism" which does not negatively affect other groups of workers.[650] It may be argued that reasonable accommodation and affirmative action share significant similarities, but also differ under certain circumstances. Despite that, both categories rely on a concept of equality that seeks differential treatment for an under-represented group of individuals. The ADA indeed further compels employers to provide preferential workplace adjustments to persons with disabilities regardless of whether those same modifications are provided to the non-disabled workers. The concept of reasonable accommodation is based on a substantive model of discrimination that requires employers to treat persons with disabilities differently than other non-disabled individuals.[651] The preferential treatment of persons with disabilities underlying the duty to accommodate should be recognised by American courts as the cornerstone of the ADA's protection. Thus, the Congress' original idea was "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals of disabilities".

[649] S. Fredman, *Anti-discrimination laws and work in the developing world: A thematic overview Background paper for the world development report* (2013).
[650] S. F. Befort and T. H. Donesky, Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both? (2003) 45 *Arizona Law Review* 931, p. 1806.
[651] P. S. Karlant and G. Rutherglen, Disabilities, discrimination, and reasonable accommodation (1996) 46 *Duke Law Journal* 1.

2.5.5 *The American model of reasonable accommodation: duty or privilege?*

The courts' interpretation of the ADA reveals that such a law has been perceived to ensure benefits to individuals who are merely considered to have a disability. The ADA has been wrongly identified as a "redistributive scheme" that privileges persons with disabilities who do not deserve such advantages.[652] As a result, the Supreme Court imposed a strict standard to identify the ADA's personal scope and apply the duty to provide reasonable accommodation. By evoking those negative consequences that may affect non-disabled co-workers, the Court seems to endorse the idea according to which minority groups are in a privileged position in comparison with other groups. This approach implies that accommodating marginalised groups may bring about reverse discrimination at the expense of non-disabled individuals.

Nevertheless, the Court's understanding of the concept of reasonable accommodation is still highly ambiguous. The case of *PGA Tour, Inc. v. Casey Martin* may be cited here as it shows to what extent the obligation to accommodate workers with disabilities has been approached by US courts.[653] This case originated from the claim of Casey Martin, a talented golfer who qualified for the PGA TOUR in 2000. Martin was also an individual with a disability as defined in the ADA who has been afflicted with Klippel-Trenaunay-Weber Syndrome, a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart. He made a request for permission to use a golf cart to accommodate a mobility impairment, but the petitioner refused to review those records or to waive its walking rule. The petitioner mistakenly assumed that accommodating the plaintiff's impairments would have made work easier for the disabled. This decision therefore precluded him from playing in any PGA tournament.

[652] See for instance, S. R. Bagenstos, Rational Discrimination, Accommodation and the Politics of Disability Civil Rights (2003) 89 *Virginia Law Review* 862.
[653] *PGA tour, inc. v. Martin* (00-24) 532 U.S. 661 (2001) 204.

The Court found that a modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to "fundamentally alter" the tournament. Therefore, a sports governing body must make reasonable accommodations to provide a physically impaired athlete with an opportunity to compete in the subject sport.[654] The Court clearly stated that discrimination under the ADA includes the failure to make reasonable modifications in policies or accommodations to individuals with disabilities unless an entity can show that the modification would have "fundamentally altered the nature" of such policies. This judgement pointed out the correct scope of the duty to accommodate which does not require an employer to make working tasks easier for the recipient, but aims to enable an individual to perform essential job functions on equal basis with others.[655]

Against this backdrop, it is worth noting that the Supreme Court's interpretation of the notion of reasonable accommodation remains controversial. It relies on a formal approach to non-discrimination that does not demand an effective adaption of those labour policies that hinder the full and effective participation of persons with disabilities in the workplace. The reasonable accommodation requirement is widely perceived as a charitable provision which requires expensive and positive actions upon employees. It may be argued that the legal obligation to provide reasonable accommodation is wrongly associated to a privilege towards persons with disabilities that justifies unequal treatment of workers. This understating is also evident in a leading judgement of the Supreme Court concerning the similar duty to make reasonable accommodations to the religious needs of employees. In the case of *Trans World Airlines, Inc. v. Hardison*, the su.[656] The Court expressly stated that this accommodation would have triggered an "unequal treatment" of workers granting a *privilege* to those individuals who claim Saturdays off for religious reasons.

[654] M. J. Mitten, A Review of Post-PGA Tour, Inc. v. Martin Legal Developments Regarding the Participation Rights of Disabled Athletes (2011) 4 *Journal Intercollegiate Sport* 101.
[655] M. A. Stein, A. Silvers, B. A. Areheart & L. P. Francis, Accommodating Every Body (2014) 82 *The University of Chicago Law Review* 690, p. 738.
[656] United States Supreme Court, *Trans World Airlines, inc. v. Hardison*, (1977) No. 75-1126.

The legal interpretation of the duty to provide reasonable accommodation given by the Supreme Court of Canada's decisions will be now analysed. It is submitted that the Canadian Supreme Court has better understood and applied the obligation to accommodate than the US Supreme Court.

3. Canadian disability law

Canada recently ratified the CRPD showing a renovated commitment to tackle discrimination and achieve full inclusion for persons with disabilities. The Canadian legal framework presents significant differences in comparison with the American legal system in relation to the protection of persons with disabilities. It indeed lacks a comprehensive piece of legislation dealing exclusively with the rights of persons with disabilities.

The main instrument to provide equality and combat discrimination is the Canadian Charter of Rights and Freedoms (the Charter) which includes all those human rights that have constitutional protection and applies to all different jurisdictions in Canada.[657] According to Section 15 of the Charter:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

The Charter however has a limited scope as it ensures protection only with regard to government laws and actions. By contrast, the Canadian Human Rights Act (CHRA) has a broader application and prohibits natural and legal persons from discriminating against an employee, tenant or service-user.[658] Section 3 of the CHRA states that:

[657] L. Barnett, J. Nicol and J. Walker, *An examination of the duty to accommodate in the Canadian Human Rights Context*, Library of Parliament Background Paper, Ottawa (2012).
[658] *Ibid*.

> "The prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered."

Moreover, the CHRA specifies that discriminatory practices are exclusively allowed on the basis of a *bona fide* occupational requirement. It must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost (Section 15.2).

It is worth noting that Canadian human rights law does not provide any legal definition of 'disability' and an explicit duty to provide reasonable accommodation for persons with disabilities. This obligation is however included in the Employment Equity Act which requires every employer to implement employment equity by making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in society (Paragraph 5.b).[659]

The next sections will briefly examine the judicial understanding of the definition of disability and the Canadian courts' interpretation of the legal nature of the duty to provide reasonable accommodation. It will be shown that the Supreme Court of Canada embraces a substantive model of equality that reflects the main legal developments enshrined in the CRPD.

3.1 The social model of disability

In *Mercier*,[660] the Supreme Court emphasised a flexible and broad definition of disability that takes into account several factors such as evolving biomedical, social and technological developments.

[659] Employment Equity Act (S.C. 1995, c. 44)
[660] Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), 2000 SCC 27.

The Court ruled that the City of Montréal and the City of Boisbriand discriminated against Réjeanne Mercier and Palmerino Troilo on the basis of their disability. The City of Montréal refused to hire Mr Mercier as a gardener-horticulturist because a pre-employment medical exam revealed an anomaly of his spinal column. Similarly, the City of Boisbriand dismissed Mr Troilo from his position as a police officer as he suffered from Crohn's disease. However, according to the medical evidence, the claimants could perform the normal duties of the position at issue because they had no functional limitations.

The Supreme Court's reasoning is highly relevant as it adheres to an evolving concept of disability that also includes the *subjective* element of being considered disabled. Discrimination is often based on subjective perceptions and stereotypes rather than the concrete existence of functional limitations. The Court underlined that the Charter of Human Rights and Freedoms (Charter) does not define the ground 'handicap'. Nonetheless, it excluded that the word 'handicap' solely entails a physical or mental anomaly that results in functional limitations. The Court adopted a 'liberal and purposive interpretation' and a 'contextual approach' that acknowledge the subjective component of any discrimination based on grounds of disability.[661] The definition of disability indeed does not merely require the presence of individual functional limitations.

The Court positively refused a narrow definition of 'handicap' and privileged a multidimensional approach that contemplates the socio-political dimension of being disabled. In doing so, the reasoning mainly focused on human dignity, respect and the right to equality rather than the biomedical condition of the individual. The Court recognised that "disability may exist even without proof of physical limitations".[662] It correctly emphasised that discrimination on grounds of disability may occur because of social prejudices and stereotypes.[663] As a result, courts should not only consider an

[661] *Ibid.*
[662] *Ibid.*
[663] *Ibid*, para. 77. "By placing the emphasis on human dignity, respect, and the right to equality rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea

individual's biomedical impairment, but also those external circumstances that hamper the enjoyment of fundamental rights. The Supreme Court rejected the medical model of disability that focuses on the precise cause of the disability and pointed out the importance of assessing those relevant effects of the discriminatory treatments. It made clear that disability represents a social construct that should be interpreted in a broad manner:

> "A handicap may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a "handicap" for the purposes of the *Charter"*.[664]

In the present case, the Court established that the applicants will have the burden of proving:

> (i) the existence of a distinction, exclusion or preference, in this case the dismissal and the refusal to hire; (ii) that the distinction, exclusion or preference is based on a ground of handicap, and (iii) that the distinction, exclusion or preference has the effect of nullifying or impairing the right to full and equal exercise of human rights and freedoms.[665]

It is worth saying that the Court's words resemble the definition of discrimination of Article 2 of the CRPD according to which discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms. This judgement is remarkable as it anticipates those crucial and innovative developments introduced by the CRPD with regard to substantive equality and the social model of disability. The Court found that the notion of disability should be interpreted consistently with various biomedical, social or technological factors without be confined under a rigid and immutable definition. This

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or perception of a "handicap". In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes".

[664] *Ibid*, para 79.

[665] *Ibid*, para 84.

approach is interesting because it takes into account the interaction between persons with impairments and those external barriers that may hinder their participation in society.

Three significant judgements of the Supreme Court of Canada will now be examined in order to show how the concept of reasonable accommodation is understood and applied in Canada.

3.2 Defining the meaning of reasonable accommodation

In the case of *Meiorin,*[666] the Supreme Court of Canada adopted an outstanding interpretation of the legal duty to accommodate that fosters the substantive concept of equality. By doing so, the Court acknowledged that the prohibition of discrimination and the subsequent obligation to provide reasonable accommodation are crucial legal requirements to design workplace standards.[667]

The *Meiorin* decision originated from the compliant of a firefighter in British Columbia who was fired because she failed to pass a mandatory physical test. She argued that the test brought about adverse effect discrimination based on sex because men as a group have a higher aerobic capacity than women, and consequently are more able to meet the standard required by the law. The Court holds that the claimant established a *prima facie* case of discrimination, the burden then shifted to the government to demonstrate that the aerobic standard could be regarded as a *bona fide* standard. The government failed to show that the particular aerobic standard required by the law was reasonably necessary to select those individuals who are able to perform the tasks of a forest firefighter safely and efficiently. The government failed to prove that it would have experienced an undue hardship if a different standard were adopted.

This case does not specifically address disability discrimination, but outlines clear guidelines to develop an interpretive framework that encourages the implementation of the substantive model of

[666] *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union*, [1999] 3 SCR 3 *(Re Meiorin)*
[667] R. Hatfield, Duty to accommodate (2005) 24 *Just Labour* 5.

equality.[668] The importance of this judgement stems from the elaboration of "a unified three-step test" in order to assess the existence of discriminatory practices in the workplace or justified *bona fide* occupational requirements.[669] The Court required that:

I. The employer must show that it adopted the standard for a purpose rationally connected to the performance of the job. The focus at the first step is not on the validity of the particular standard, but rather on the validity of its more general purpose.

II. The employer must establish that it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose.

III. The employer must establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[670]

The three-step test of the Supreme Court demands an overview of the validity of the general purpose of the standard adopted and the assessment of the employer's subjective reason for introducing such standard. Then, it aims at verifying the impossibility to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. Whether the employer cannot demonstrate that the rule represents a *bona fide* requirement in accordance with the three-step test, it would be considered as a discriminatory rule.[671] This new approach implies that employers have the obligation to accommodate the characteristics of individual employees unless it is impossible to avoid discriminating without imposing undue hardship upon the employers.

The Court emphasised that employers have the legal obligation to take into account both the differences between individuals, and differences that characterise groups of individuals.[672] In this

[668] M. Lynk, Accommodating Disabilities in the Canadian Workplace (1999) 7 *Canadian Labour & Employment Law Journal* 183.
[669] *Ibid*.
[670] *Meiorin*, para. 58.
[671] G. Brodsky, S. Day, and Y. Peters, *Accommodation in the 21st Century*, Canadian Human Rights Commission, (March, 2012).
[672] *Meiorin* at para. 68.

regard, to the extent that a standard unnecessarily fails to accommodate the differences among individuals, it does not comply with the prohibition of discrimination under human rights law. The Court indeed stated that:

> "Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, insofar as this is reasonably possible".[673]

The Court's reasoning for the first time maps a clear route to promote substantive equality by highlighting that those standards concerning the performance of work should be adopted to promote the participation of all members of society, insofar as this is reasonably possible. Conceptions of equality must be translated into reasonable workplace standards. By doing so, the duty to provide reasonable accommodation is not merely a provision to be implemented on a case-by-case basis, but it constitutes an inclusive and universal approach to the design of workplace environment. The analysis will now focus on how the Supreme Court implemented the three-step test in another important case that specifically regards persons with disabilities.

3.3 Accommodating persons with disabilities: the promising case of *Grismer*

In *Grismer*,[674] the Supreme Court applied the three-step test with regard to the duty to provide reasonable accommodation for persons with disabilities in the context of housing and services industries. The Court underlined that accommodation implies "what is required in the circumstances to end discrimination. Standards must be as inclusive as possible".[675]

[673] *Ibid*, para. 68.
[674] British Columbia (Superintendent of Motor Vehicles) *v*. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868.
[675] *Grismer*, at para. 22.

The claimant suffered from homonymous hemianopia (H.H.) which eliminated most of his left-side peripheral vision in both eyes. The B.C. Superintendent of Motor Vehicles cancelled his driver's licence because his vision no longer complied with the standard of a minimum field of vision of 120 degrees. Grismer however claimed that the use of glasses with prisms would have compensated his disability. After several rejections of the licence and despite passing the requisite tests, the claimant brought a complaint before the B.C. Council of Human Rights. The Council concluded that the standard was a *prima facie* direct discrimination and that the Superintendent failed to show that an inflexible application of the visual field standards, without individual assessments, was reasonably necessary. As a result, the Superintendent was ordered to assess individually whether Mr. Grismer was able to drive safely, regardless of his capacity to meet a 120-degree field of vision.

In this case, the Court applied the *Meiorin* test and the Superintendent was then required to demonstrate on a balance of probabilities that the discriminatory standard had a *bona fide* reasonable justification. The Superintendent argued that the standard was reasonably necessary to the goal of highway safety, balancing the need for people to be licensed and the need for public safety. In this regard, the accommodation required by the complainant was impossible without undue hardship. This aim was considered legitimate and rationally connected to the general purpose of issuing driver's licences. The standard of a minimum field of vision of 120 degrees was also adopted in good faith. By contrast, the standard was not reasonably necessary to achieve the goal. According to the Court, the Superintendent failed to show that this condition undermines reasonable highway safety. The evidence indeed indicated that individuals with less than full peripheral vision have the ability to drive safely. Moreover, the Superintendent did not prove that the risk or cost associated with the duty to provide individual assessment constituted undue hardship.

The fundamental point of this judgement is that the discriminatory practice is not the refusal to release a driving licence, but the refusal to ensure an individual assessment of the claimant's ability to drive without undermining the essential aim of reasonable road safety. The Superintendent did not provide

a reasonable approach to licensing and adopted an *absolute standard* which was not supported by convincing evidences.[676] As in *Meiorin*, the third stage of the test was crucial to assess the validity of the government's defence. The Superintendent did not prove that its non-accommodating standard was reasonably necessary for ensuring highway safety.[677] The Court emphasised that there were at least two ways in which the Superintendent could have showed that a standard that does not allow accommodation is reasonably necessary. He could have argued that that no one with the particular disability can drive safely and meet the desired objective of reasonable safety. Alternatively, he could have showed that accommodation is unreasonable because testing for exceptional individuals who can drive safely despite their disability is impossible short of undue hardship.[678] The Court expressly recognised that both ways are types of accommodation that have been overlooked by the Superintendent.

The judgement of the Canadian Supreme Court is highly relevant to improve the protection of persons with disabilities and clarify the legal content of the duty to accommodate. The Court's approach refuses the formal interpretation of the prohibition of discrimination and endorses the substantive purpose of human rights legislation. To this end, it provides valid tools to tackle discrimination in the workplace and establishes clear guidance for employers to implement the obligation to provide reasonable accommodation. This duty has been often underestimated by employers or reduced to an extraordinary remedy to address the conditions of workers with disabilities by national courts. The judicial uncertainty surrounding the legal understanding of the concept of reasonable accommodation has been positively overcome by the interpretation developed by the Canadian Supreme Court.

It may be argued that the Court's decisions in *Meiorin* and *Grismer* laid down the foundations for a substantive equality framework in line with the CPRD. However, the post-*Meiorin* and post-*Grismer*

[676] G*rismer*, para. 42.
[677] G. Brodsky, S. Day, and Y. Peters, *Accommodation in the 21st Century*, Canadian Human Rights Commission (March, 2012), p. 14.
[678] *Grismer*, para. 43.

period case law showed an increasing reluctance towards the model of reasonable accommodation delineated by the Supreme Court.[679] Lower courts started to adopt a 'minimalist' version of accommodation and a 'formal' comparator group analysis.[680] It seems that governments pushed for a restricted definition of discrimination and for reconsidering stereotype as an essential component of a claim of discrimination.[681] Against this background, the Supreme Court of Canada was called again to interpret and reinvigorate the duty to provide reasonable accommodation for persons with disabilities. The more recent case of *Moore* will now be analysed to assess how the Court confirmed its approach towards a substantive model of equality.

3.4 Boosting the duty to accommodate

In *Moore v British Columbia,* the Court handed down a landmark decision which refuses to apply a formalistic comparator group analysis and shows a significant understanding of the duty to accommodate.[682]

The case regarded a child, Jeffrey Moore, who was diagnosed with a severe learning disability and therefore required intensive remediation to learn to read. Due to funding cuts by the Province, the Diagnostic Centre was closed by the school district and Jeffrey was transferred to a private school. As a result, his father filed a complaint with the B.C. Human Rights Tribunal against the school district and the Province on the grounds that Jeffrey had been discriminated against because of his disability and been denied a "service customarily available to the public".

Lower courts wrongfully applied a formal comparative discrimination analysis and concluded that there was no discrimination against Jeffrey. According to this approach, the claimant has to

[679] G. Brodsky, Moore v British Columbia: Supreme Court of Canada Keeps the Duty to Accomodate Strong (2013) 10 *Journal of Law and Equality* 85.
[680] G. Brodsky, S. Day, and Y. Peters, *Accommodation in the 21st Century*, Canadian Human Rights Commission (March 2012), p. 42.
[681] *Ibid*.
[682] *Moore v. British Columbia* (Education), 2012 SCC 61.

demonstrate the existence of differential treatment in comparison with "a mirror comparator group to whom a sough-after benefit is provided".[683] In the case at issue, the mirror comparator was represented by other special-needs students who did not receive the accommodation required. Consequently, the lower courts did not recognise any discrimination against the claimant and strictly applied a formal comparative approach.

The Supreme Court's judgement is highly relevant as it rejects the lower courts' reasoning and emphasise the flaws of this formalist comparative model. The Court correctly stated that:

> "Comparing J only with other special needs students would mean that the District could cut *all* special needs programs and yet be immune from a claim of discrimination. If J is compared only to other special needs students, full consideration cannot be given to whether he had meaningful access to the education to which *all* students in British Columbia are entitled. This risks perpetuating the very disadvantage and exclusion the *Code* is intended to remedy".[684]

The Supreme Court rightfully identifies the *ratio* of the obligation to provide reasonable accommodation to persons with disabilities. Disability accommodation cases indeed do not aim at demonstrating that persons with disabilities are treated differently in comparison with members of other groups. The main scope of such cases is to assess the failure to provide those reasonable adjustments that would enable persons with disabilities to enjoy their rights on equal basis with others. It is therefore incoherent the judicial approach that demands the proof of being treated differently from others to trigger the obligation to provide reasonable accommodation.[685] The formalist comparative model fails to properly determine the *group* to whom the claimant should be compared and the *object* of the comparison. The accommodation indeed requested by the claimant was not provided to any member of other groups of individuals. The discrimination claim would have been

[683] *Ibid*, p. 88.
[684] *Moore v. British Columbia* (Education), para 30 and 31.
[685] G. Brodsky, Moore v British Columbia: Supreme Court of Canada Keeps the Duty to Accommodate Strong (2013) 10 *Journal of Law and Equality*, p. 89.

unsuccessful also in case the claimant had attempted to compare his experience to the treatment granted to students without disabilities.

The specific nature of the duty to accommodate requires focusing the analysis on the *adverse impact* on the claimant of the failure to provide such adjustments rather than on the differential treatment the individual receives in comparison with others. This interpretation is line with a substantive model of equality demanding the realisation of positive measures to ensure the full enjoyment of human rights to persons with disabilities. It thus abandons the understanding according to which the obligation to make reasonable accommodation only implies the negative duty to not carry out differential treatments between individuals in similar situations. In *Moore*, the Court convincingly clarified the legal nature of the concept of reasonable accommodation and reinforced the protection of persons with disabilities in compliance with the CRPD.

The dissimilarities between the judicial approach adopted by the Supreme Court in Canada and in the US will be now briefly summarised.

4. Comparing the judicial interpretation of disability law in the US and Canada

An overview of the main differences between the interpretation and implementation of the concepts of disability and reasonable accommodation in the US and Canada will now be given. It will be shown how US disability law still adheres to a formal model of equality, whereas the Canadian Supreme Court has adopted significant decisions to promote substantive equality.

4.1 The definition of disability

The American legal system is characterised by a contradictory approach with regard to the understanding of disability. The ADA indeed adopted a social model of disability that takes into account the interplay between the impairment of the individual and those external barriers that hamper his/her participation in society. The ADA also covers those individuals who meet the requirement of

"being regarded as having such an impairment".[686] The "regarded as" prong remarkably addresses discriminations based on a *stereotyped* or *misrepresented* perception of disability. However, the judicial interpretation of the ADA leaded to a highly restrictive approach to statutory coverage.[687] In *Sutton*, the American Supreme Court ruled that it is necessary to consider the ameliorative effects of mitigating measures in order to determine whether an individual has a disability. Moreover, the Court concluded that an individual can fall under the ADA's definition of disability only if he or she sufficiently alleges to be regarded as substantially limited in the major life activity of working. The judicial backlash against the ADA pushed the US Government to approve the ADA Amendments Act of 2008 (ADAAA) in order to restore the broader scope of the ADA. Against this background, it may be argued that American judges are unfamiliar with the socio-political conception of disability and the substantive model of disability law according to which disability results from the failure of society to advance the rights of persons with disabilities.

On the other hand, it is worth noting that Canadian law lacks a comprehensive definition of disability. Nonetheless, the Supreme Court adopted a creative and extensive understanding of disability in line with the renewed international framework. The Supreme Court's reasoning is highly interesting because it embraces a *flexible* and *open* concept of disability. It includes several elements such as the subjective component of being considered disabled and those biomedical, social or technological factors that are in continuous evolution in our society. The multidimensional approach towards disability embraced by the Supreme Court represents a landmark interpretation of a complex and evolving phenomenon that requires different levels of analysis and intervention.

[686] ADA 1990, U.S.C 12102(2).
[687] L. H. Krieger, *Backlash against the ADA: reinterpreting disability rights* (University of Michigan 2003).

4.2 The legal nature of reasonable accommodation

As outlined in Section 2.3, the American Supreme Court adopted rigid standards to fall under the protection of the ADA and apply the subsequent obligation to provide reasonable accommodation. The Court emphasised the negative implications that may affect non-disabled co-workers when employers are called upon to accommodate marginalised groups of individuals. This approach seems to imply the idea that minority groups are in a privileged position in comparison with other groups. The case law relating to the ADA indeed shows that the concept of reasonable accommodations is regarded by the Supreme Court as a means to provide preferential treatment for persons with disabilities. The reasonable accommodation obligation is perceived as a charitable provision demanding burdensome and positive actions on employees. This reasoning has been clearly adopted in the case of *Airways Inc. v Barnett*, where the Court was called to balance between the duty to provide reasonable accommodation and the labour goal of restricting employer discretion.[688] According to the American Court, accommodating persons with disabilities may generate arbitrary treatments in the workplace, reinforce employer discretion and frustrate non-disabled employees' contractual rights or expectations. The Supreme Court's interpretation promoted labour goals over equal opportunities policies and equality norms.

By contrast, the judicial approach of the Canadian Supreme Court in *Meiorin*, *Grismer* and *Moore* reflects the ambitious developments of international human rights law to realise substantive equality goals. The CRPD indeed aims at ensuring that reasonable accommodations are provided to all persons with disabilities through proactive and anticipatory steps. To this end, the Court developed a stringent test to assess *bona fide* occupational requirements. The test implies a significant legal responsibility on the employer who has to reasonably justify that a particular disability jeopardises the performance of the job. The three-step interpretative guidelines of the Court are comprehensive and precise enough

[688] M. A. Sapiro, Labor Goals and Antidiscrimination Norms: Employer Discretion, Reasonable Accommodation, and the Costs of Individualized Treatment (2013) 32 *Yale Law & Policy Review* 1.

to verify the validity of certain standards. The Canadian Court seems to promote a concept of reasonable accommodation that requires a structural change of the legal framework by challenging able-bodied norms and introducing diversity in all new norms.[689]

It is worth noting that the Canadian Court's judgements reveal a profound understanding of the duty to accommodate that is in line with the current CRPD's principles. The Canadian Court refuses the imposition of *absolute standards or requirements* that can compromise the content of human rights law and curtail the protection of persons with disabilities. In addition, the Court rightfully points out that the scope of the obligation to accommodate is to assess the failure to remove barriers to persons with disabilities. It therefore disregards a formal model of equality that considers reasonable accommodation as only a negative duty that precludes comparable situations from being treated differently. This approach significantly differs with the interpretation of the U.S. Supreme Court which shows significant difficulties in interpreting the social model of disability and the duty to provide reasonable accommodation in compliance with international human rights law.

Against this background, it may be said that the judicial interpretation of the Canadian Supreme Court may represent a leading model for the judiciary to implement the duty to provide reasonable accommodation at national and international level.

[689] D. Pothier, Tackling disability discrimination at work: toward a systemic approach (2010) 4 *McGill Journal of Law and Health* 1.

CHAPTER 6

A COMPARATIVE APPROACH TO THE DUTY TO PROVIDE REASONABLE ACCOMMODATION: UK AND ITALY

1. Comparing the UK and Italy

This chapter aims to analyse two different legal systems with respect to the application of the obligation to make reasonable accommodation in order to stress positive and negative experiences. To this end, existing regulations and national courts' judgements will be examined and compared. The final objective is to draw from the following comparative assessment what may be viewed as successful legal practices and judicial reasoning which reflect the legal developments introduced by the CRPD.

The choice of selecting the UK and Italy originates from the idea to assess and compare the protection of persons with disabilities under an overarching legal scheme such as the UK Equality Act and a system which lacks a comprehensive piece of legislation such as the Italian legal system. Italian equality law may be considered 'fragmented' because it does not have a unified system of norms in the field of equality and non-discrimination. This study assesses how disability equality law has been implemented in the UK and Italy by highlighting the main relevant approaches of national judges. In particular, the comparative analysis will examine the legal implications stemming from the duty to provide reasonable adjustments for persons with disabilities on the workplace.

This research will demonstrate that UK courts are progressively adhering to a formal approach towards equality which disregards those social barriers existing in society that hamper the full enjoyment of fundamental rights. By contrast, Italian courts are gradually recognising a substantive model of equality that is in line with the CRPD. Moreover, it will be shown how the CPRD and EU law are having a significant impact on the interpretation of domestic law in Italy, whereas UK judges avoid referring to supranational norms when deciding cases related to persons with disabilities. An

overview of the main equality norms for the protection of persons with disabilities under UK law will be now given.

2. Introducing the UK legal framework

The duty to provide reasonable accommodation in the workplace is embodied in Article 5 of Directive 2000/78 and Article 5(3) of the CRPD. It constitutes the main non-discrimination obligation that ensures the full enjoyment of human rights for persons with disabilities on equal basis with others. Unlike the CRPD, EU law does not expressly consider the denial of reasonable accommodation as a form of discrimination. By contrast, according to UK law, the failure to provide reasonable accommodation is a form of discrimination.[690]

The Disability Discrimination Act 1995 was the principal legal instrument to tackle discrimination against persons with disabilities in the UK. The DDA provided three types of obligations: the *reactive* reasonable adjustments duty, the *anticipatory* reasonable adjustment duty and the obligation *not to withhold consent unreasonably* to the making of adjustments.[691]

The reactive duty imposed employers to make adjustments in case of any physical feature that places the disabled person at a substantial disadvantage in comparison with persons without disabilities. The anticipatory provision set out the duty to anticipate and take reasonable steps to remove barriers affecting groups of disabled people. The latter obligation stated that landlords are prohibited from withholding their consent unreasonable to the making of the necessary alterations in favour of persons with disabilities. Against this background, the most interesting provision is the reasonable *anticipatory* duty, because it demands an active role of employers and the preventive removal of all barriers. Despite that, this provision did not apply to the employment area and private sector.

[690] Section 20 of Equality Act 2010.
[691] A. Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment* (Oxford, 2008).

Currently, the DDA has been replaced by the 2010 Equality Act. It represents a remarkable piece of legislation that seeks to harmonise the UK legal framework with regard to equality and non-discrimination. It indeed replaces nine previous major pieces of legislation and implement four main EU Directives in order to simplify and systematise equality law.[692]

The UK Equality Act however embraces the previous legal approach adopted by the DDA and sets forth a *reactive* reasonable adjustment duty only in the context of employment. By doing so, it failed to bring about a systemic change under UK equality law.[693] It requires an anticipatory reasonable adjustment duty exclusively in non-employment areas. It imposes on service providers the obligation to take steps to identify and remove accessibility barriers in advance of complaints by particular disabled people.[694] By contrast, the duty to provide reasonable accommodation in the workplace is merely reactive and cannot be triggered until an employee with disabilities is placed at a substantial disadvantage.

Section 20 of the Equality Act requires three requirements to trigger the duty to make adjustments:

> 4. The first requirement is a requirement, where a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

[692] See B. Hepple, The New Single Equality Act in Britain (2010) 5 *The Equal Rights Review* 11.
The UK Equality Act replaces the following nine pieces of national legislation: Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995, Employment Equality (Religion or Belief) Regulations 2003, Employment Equality (sexual Orientation) Regulations 2003, Employment Equality (Age) Regulations 2006, Equality Act 2006, Part 2, Equality Act (Sexual Orientation) Regulations 2007. It also implements four EU Directives: Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Directive); Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (Framework Employment Directive); Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37 (Equal Treatment Amendment Directive); European Parliament and Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast Equal Treatment Directive).
[693] A. Lawson, Disability and Employment in the Equality Act 2010: opportunities seized, lost and generated (2011) 40 *Industrial Law Journal*, 359.
[694] European network of legal expert in gender equality and non-discrimination, *Reasonable accommodation for disabled people in employment, A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway*, prepared by D. Ferri and A. Lawson (European Commission, Directorate-General for Justice and Consumers, 2016).

5. The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

6. The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

This chapter will explore to what extent UK courts have been applying and interpreting the concept of reasonable accommodation. The aim is to identify whether the duty to provide reasonable accommodation is implemented in compliance with the CRPD's provisions.

2.1 *Archibald v Fife:* an outstanding case

The ruling in *Archibald v. Fife* is the most significant and illustrative case concerning the implementation of the obligation to provide reasonable adjustments in the UK legal system.[695] It made clear that any employer has to ensure reasonable accommodation for an employee who has become disabled and is no longer able to perform his/her previous tasks. In this case, the employer should transfer him/her to a different job for which the employee is qualified.

In the case of *Archibald v Fife Council*, the applicant was a road sweeper who became unable to work because of complications from a spinal anaesthetic. She started to use a wheelchair and then was able to walk with the assistance of walking sticks. She applied for different jobs in order to find suitable alternative employment in other departments. However, Council policy demanded competitive interviews for each application and she could not comply with the high physical standards required. The Council argued to have undertaken all the necessary redeployment procedures and she was therefore dismissed. The claimant asserted that, in dismissing her because of the inability to work as a road sweeper, due to her disability, the Council treated her less favourably than others who could

[695] *Archibald v Fife Council* [2004] UKHL 32, see also D. Renton, A new era for equality law? Archibald v Fife Council reconsidered (2006) 21 *Disability and Society* 709.

do their work. She alleged that the Council had failed to comply with the duty to provide reasonable accommodation imposed by the DDA. She should have been transferred to a vacant post within the Council without requiring her to undertake a competitive interview for the post.[696] The House of Lords was therefore called to clarify whether this obligation is triggered when an employee becomes incapable of performing his/her current working tasks, but retains the capacity to do a different job for the same employer. In its ruling, the House of Lords clarified the specific purpose of equality law that aims to protect persons with disabilities.

2.1.1 *The purpose of equality law*

The judgement properly identified the different legal purpose underlying gender equality law and legislation that addresses disability discrimination. Gender equality law aims to ensure that men and women are treated equally, as they are the "opposite sides of the same coin".[697] A more favourable treatment for men implies that women are discriminated against. Gender differences are generally regarded as irrelevant. By contrast, the DDA recognises that differences between persons with disabilities and others are highly relevant. As a consequence, disabled individuals cannot be treated in the same way of persons without disabilities. The obligation to make reasonable adjustments is indeed the legal tool to address the special needs of disabled people. The court acknowledged that this concept entails an element of more favourable treatment. This understanding adheres to the substantive equality approach that characterises the new international human rights framework, which requires positive action measures, accommodation programmes and preferential treatments for certain groups of individuals.[698] In particular, this approach is in line with the scope of Directive 2000/78, which does not merely aim to secure equality of opportunity, but expressly contemplates the possibility to provide specific positive action. Article 7 states that:

[696] *Archibald v Fife Council* [2004] UKHL 32, para. 26.
[697] *Ibid*, para. 47.
[698] M. de Vos, Beyond formal equality, *Positive Action under Directive 2000/43/EC and Directive 2000/78/EC* (European Commission, 2007).

1. "With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.
2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

This provision specifically addresses persons with disabilities and encourages the adoption of positive measures to promote the participation of persons with disabilities in the labour market. It was expressly introduced to allow positive action in the field of disability which would be otherwise considered as positive discrimination by the CJEU.[699] Even if the DDA predates the Directive 2000/78/EC, the House of Lords correctly interpreted the goal of securing equality by recognising that the duty to provide reasonable adjustments might imply under certain circumstances the preferential treatment of persons with disabilities over non-disabled individuals. The legal requirements to trigger the obligation to accommodate workers with disabilities will now be briefly examined.

2.1.2 *When is the duty of making adjustments triggered?*

According to Section 6 of the DDA, the duty to provide reasonable adjustments applies "where any arrangements made by or on behalf of an employer or any physical feature of premises occupied by the employer, place the disabled person concerned at a *substantial disadvantage* in comparison with persons who are not disabled".[700] Moreover, "it is the duty of the employer to take such steps as it is

[699] R. Whittle, 'The Framework Directive for Equal Treatment in Employment and Occupation: an Analysis from a Disability Rights Perspective' (2002) 27 *European Law Review* 303.
[700] Disability Discrimination Act 1995, s.6(3)(c), 1995 C. 50.

reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that *effect*".[701]

The obligation applies in relation to those arrangements for determining to whom the job should be offered and to any terms or condition on which employment, promotion, transfer, training or any other benefit is offered or afforded.[702] However, the term 'arrangements' is not properly defined and may include the Council's redeployment policy. In the case of *Archibald*, the main issue was to determine whether the arrangements adopted by the employer placed the complainant at a substantial disadvantage in comparison with non-disabled persons. The job description required the capacity to walk and sweep, the claimant could not clearly meet these requirements, and hence she was dismissed for incapacity.

The court highlighted that 'the effect of being placed at a substantial disadvantage' does not depend on the circumstances that there are other persons with disabilities doing the same job. According to this approach, if there are only non-disabled people performing the same job, the duty to provide reasonable accommodation is not triggered.[703] It would be the claimant's disability rather than Council's arrangements which has 'the effect of placing the disabled person at a substantial disadvantage'. As a result, the Council could not provide any reasonable adjustments to prevent this effect. This approach would rely on an obsolete model of disability that merely focuses on individual impairment and ignores social barriers.

On the other hand, if there are also disabled people doing the same job, then the Council could take specific action to prevent the job description having the effect of placing persons with disabilities at a substantial disadvantage in relation to others. In such cases, the employer has the obligation to change or modify the job description by introducing the possibility to transfer the disabled persons to

[701] *Ibid*, s. 6(2)(a)(b).
[702] *Ibid*, s. 6(2)(a)(b).
[703] *Archibald v Fife Council* [2004] UKHL 32, para. 64.

another job, as expressly mentioned by section 6(3)(c). The Court however rejects this formalistic comparative approach and concludes that the duty to provide reasonable accommodation arises in any case "where an employee becomes so disabled that she can no longer meet the requirements of her job description".[704] The Court outlines that the DDA is not based on the 'like for like' comparison which is expressly required by the Sex Discrimination and Race Relations Acts. This means that it is not necessary to demonstrate that other individuals are in similar circumstances to the disabled person in order to trigger the duty.

The Court's interpretation seems to accept the limits of a rigid comparative approach that strictly demands the existence of a comparator who does not share the same characteristic as the claimant and enjoy a better treatment. It rather focuses on the assessment of the employee's incapacity to comply with the requirements of the job. By doing so, the Court goes beyond the comparator-based approach as it jeopardises the recognition of preferential treatments and does not acknowledge that the discriminatory treatment should be assessed in relation to the relevant characteristic of the individual and the external barriers that jeopardise his/her fundamental rights.[705]

2.1.3 *The transfer to an existing vacancy: is it a reasonable adjustment?*

Section 6(3)(c) expressly includes "transferring him to fill an existing vacancy" as an example of step which an employer could take to comply with the duty to provide reasonable accommodation. In the case of *Archibald*, the controversy is to evaluate whether this clause includes the opportunity to transfer the claimant to fill an existing vacancy at a slightly higher grade without competitive interview. The Court correctly noticed that this example of reasonable accommodation is undefined and the transfer can therefore be upwards as well as sideways or downwards. The transfer to an existing vacancy is not merely confined to short-listing or considering the disabled person. The Court indeed highlighted that the employer has already the obligation not to discriminate against a disabled

[704] *Ibid*, para. 64.
[705] See for instance, A. McColgan, *Discrimination, Equality and the Law* (Hart Publishing, 2014), p. 231.

employee in the opportunities provided for promotion, transfer, training or any other benefit.[706] Hence, the duty to provide reasonable accommodation aims to reinforce the existing anti-discrimination provisions in order to effectively secure substantive equality. As a result, the employer should have transferred Mrs Archibald to a sedentary position which she was qualified to fill. The Court properly identified the nature of this obligation that entails an additional effort on the employer to ensure that persons with disabilities enjoy human rights on an equal basis with others. To this end, it demands not only the removal of those specific disadvantages that hamper the enjoyment of all human rights, but also the adoption of specific arrangements to overcome such barriers.

The duty to provide reasonable accommodation is indeed characterised by an "individual and solution oriented" nature that focuses on the uniqueness of the specific case.[707] According to the UN Committee on the Rights of Persons with Disabilities:

> The duty to provide reasonable accommodation is an *ex nunc* duty, which means that it is enforceable from the moment an individual with an impairment needs it in a given situation, for example, workplace or school, in order to enjoy her or his rights on an equal basis in a particular context (…) Reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination or equality is assured, taking the dignity, autonomy and choices of the individual into account.

Against this background, it is worth noting that the House of Lords encouraged the duty-bearer to carry out an interactive dialogue with the disabled person in order to identify an appropriate and suitable adjustment. By doing so, the employer should refrain from making elusive assumptions concerning the feasibility of the reasonable accommodation for a particular person with disabilities.[708] In the case of *Archibald*, the House of Lords emphasised the importance of removing those arrangements that place the claimant at a substantial disadvantage in comparison with persons who

[706] DDA, section 4(2)(b).
[707] European network of legal expert in gender equality and non-discrimination, *Reasonable accommodation for disabled people in employment, A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway*, prepared by D. Ferri and A. Lawson (European Commission, Directorate-General for Justice and Consumers, 2016).
[708] *Ibid*, p. 49.

are not disabled. To this end, the employer has to identify individual solutions that can effectively ensure equality on the workplace, such as transferring a disabled employee from a post which he/she can no longer do to a job position which he/she can reasonably perform without applying standard procedures.

Following this overview of the House of Lords' approach with regard to the duty of making reasonable adjustments, the focus shifts to the interpretation of the obligation to provide reasonable accommodation given by UK courts following the adoption of the Equality Act 2010. The goal is to assess to what extent the judicial understanding of this obligation has changed as a result of the new Equality Act and the CRPD's ratification by the UK.

3. The Equality Act 2010

In the UK, the duty to provide reasonable accommodation is included in section 20 of the Equality Act 2010. This duty is supposed to be triggered when a "provision, criterion or practice" or a "physical feature" puts a disabled person at a substantial disadvantage in comparison with their peers who are not disabled. The Equality Act however does not provide any example of such reasonable accommodation.[709] This leaves a broad margin of flexibility to employers and employee in regard to the identification of those proper adjustment for the specific case. At the same time, the lack of such list can generate legal uncertainty in relation to the measures that employers are called to adopt to ensure equality in the workplace.

The main controversial approaches adopted by UK courts in relation to the duty of making reasonable adjustments will be analysed below. It will be shown that the House of Lords' findings in *Archibald*, notwithstanding how well informed they were, have been reversed in favour of a more restrictive and formal model of equality.

[709] European network of legal expert in gender equality and non-discrimination, *Country Report Non-Discrimination, United Kingdom 2016* (European Commission, Directorate-General for Justice and Consumers, 2016).

3.1 *Wade v Sheffield Hallam University*: a shift away from substantive equality?

The case of *Wade v Sheffield Hallam University* represents a significant judicial shift with regard to the obligation to provide reasonable accommodation in the workplace.[710] This case shows evident similarities with the *Archibald* one, but the judges' conclusions are considerably divergent. In this case, the Employment Appeal Tribunal (EAT) decided that it was not reasonable for an employer to transfer a disabled employer to a vacant post without undertaking a competitive interview.[711]

The claimant worked for the University and became disabled because of an allergy. She was placed on long-term sick leave. The respondent started a restructuring within the library by slotting in staff. The claimant applied for the new vacancy and failed to meet the essential criteria required for the post. The University argued that she was not capable of fulfilling the new role as she lacked the ability to lead teams and to work within the newly restructured faculty of organisation. The employee claimed that the requirement of undertaking a competitive interview for the post put her at a substantial disadvantage. She asked for a 'softer' assessment process instead of a competitive interview process and therefore claimed that the University breached the duty to provide such reasonable adjustment. The EAT upheld the first tribunal's decision and found that the accommodation claimed was not reasonable.

This decision moves away from the House of Lords' judgement according to which the disapplication of a competitive interview process and the adoption of specific trainings to upskill an employee could be reasonable adjustments. By contrast, the EAT agreed with the respondent's evidences that the new role evolved and the claimant was not suitable for the job. The EAT's conclusions appear to assume that the employee could not be upskilled by providing trainings. This approach does not acknowledge that the obligation to make reasonable adjustments is the fundamental legal instrument to advance

[710] *Wade v Sheffield Hallam University* UKEAT/0194/12/LA.
[711] See for instance, D. Cabrelli, *Employment Law in Context Text and Materials* (Oxford University Press, June 2016), p. 508.

the right of employees with disabilities in the workplace. By doing so, the court denies the element of more favourable treatment underlying the concept of reasonable accommodation.

In the case of *Archibald*, the House of Lords properly underlined the meaning of this duty that requires positive measures and specific arrangements to ensure equality in the workplace. Thus, under the previous DDA, the 'transfer to an existing vacancy' was expressly considered as a reasonable step that an employer could take to accommodate an employee with disabilities. The EAT's findings are incompatible with the model of substantive equality embodied under the UK legal framework. The possibility to provide trainings to upskill an employee in order to move him/her into a new job would indeed represent a feasible adjustment. This arrangement would not imply an automatic appointment of the person with disabilities, but it would facilitate his/her inclusion in the workplace. This controversial decision may also be the outcome of the new Equality Act's adoption which does not set out any example of reasonable accommodation. As a result, judges and employers may find several difficulties in identifying the adequate adjustments for persons with disabilities. The next section will examine other domestic judicial cases related to the duty to make reasonable adjustment. The aim is to provide a comprehensive analysis of the UK courts' approach when it comes to equality law and disability discrimination.

3.2 The case of *Jennings v. Barts & The London NHS Trust*

In the case of *Jennings v. Barts & The London NHS Trust,*[712] the EAT upheld the decision of the first instance tribunal, according to which the dismissal of a disabled employer who was on long-term sick did not breach the duty to provide reasonable accommodation.[713]

The claimant worked as senior support engineer when he was dismissed for the reason of his poor attendance record due to ill health. The absences were mainly due to angina and a stress related

[712] *Jennings v Barts & The London NHS Trust*, UKEAT/0056/12/DM.
[713] K. Jackson and L. Banerjee, *Disability Discrimination Law and Case Management* (March 2014 Update, the Law Society Publishing).

psychiatric condition. The Trust applied its absence procedure in a rigorous way by initiating disciplinary proceedings. The claimant first received a written warning under the short-term absence policy and then the Trust started the long-term absence procedure. The claimant did not attend the meetings arranged under the long-term absence procedure and he asked to rearrange the meetings until after he had had a further occupational health assessment.[714] At the final stage meeting of the long-term absence procedure, the Trust decided to dismiss him.

The claimant claimed that it would have been a reasonable adjustment to exempt him from the Trust's short-term absence policy. The Employment Tribunal however found that the respondent did not fail to make reasonable adjustments because it was not practical for the Trust to follow the claimant's suggestions and tailor its absence policies to the specific needs of Mr Jennings. Such adjustments would have brought about serious "operational problems" for the department that was moving into further period of intense activity. Moreover, he had "ample and fair opportunity to catch up with the process, but ultimately failed to make any case".[715] The EAT concluded that Mr Jennings' absence record was "severely poor" as he was absent for 100 days over a period of eight months. As a result, the Court did not find any disability discrimination and did not overturn the Trust's decision to not tolerate his absence record under the absence management policy.

3.2.1 *Sickness absence and reasonable adjustments: a critical view*

The EAT's judgement raises several concerns with regard to the implementation of the duty to provide reasonable adjustments in the workplace. The EAT indeed upheld the blanket refusal of the Trust to revise and tailor its absence policy to the peculiar case of Mr Jennings. By doing so, the EAT enabled any employer to strictly apply its sickness absence policy and dismiss an employee with a disability by proving that all the possible adjustments have been considered and that they will not

[714] *Jennings v Barts & The London NHS Trust*, UKEAT/0056/12/DM, paragraph 14.
[715] *Ibid*, paragraph 31.

work. The EAT was convinced by the fact that Mr Jennings' department was very busy and his absence would have provoked operational difficulties.

This approach clearly privileges the priorities and the operational needs of the employer at the expense of the effective participation of disabled employees in the workforce. The Tribunal's conclusion does not seem to be in line with the new developments of international human rights law and the broad interpretation given by the CJEU of the concept of reasonable accommodation.[716] Indeed, the rigorous application of the Trust's absence policy may represent a "provision, criterion or practice" that places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled. It is worth noting that persons with disabilities are more likely to have health-related absences then their non-disabled peers. As a result, the employer's absence policy should provide tailored measures and procedures in relation to persons with disabilities who are on long-term sick leave. Several reasonable adjustments have been disregarded by the employer, such as the reduction of the claimant's work or hours of work, the recognition of disability-related absence, the amendment of the attendance criterion and sickness absence policies of target setting, the lowering of performance targets, the removal of the threat of disciplinary action for a period of time or the change of the department within which the claimant worked.[717] These measures would have been reasonable in order to facilitate the claimant to return to work without causing burdensome pressure on his colleagues and department.

It may be said that this judgement is a controversial back-step in the context of the protection of the rights of persons with disabilities. The EAT's decision does not make any mention of the CPRD and frustrate the Equality Act 2010's purpose to ensure the inclusion of persons with disabilities in the workplace on equal basis with others. A similar approach has been adopted by the EAT in the case

[716] See *Ring v. Dansk*, CJEU, C-335/11 and C-337/11.
[717] Paragraph 6.3 of the CMD (Discussion Summary), see *Jennings v Barts & The London NHS Trust*, UKEAT/0056/12/DM, paragraph 31.

of *Secretary of State for Work and Pensions v Higgins*,[718] where the Tribunal examined the reasonableness of the accommodation which consists of offering a disabled employee reduced hours as part of a phased return to work. A brief overview of this case will now be offered to highlight the dominant judicial understanding of the concept of reasonable accommodation in the UK.

3.3 The case of *Secretary of State for Work and Pensions v Higgins*

Mr Higgins, an employee of Jobcentre Plus (JCP), was on long-term sickness because of a heart condition since June 2009. In August 2010, he submitted a "fit note" of his GP according to which he would have benefited from a phased return to work on altered hours. The JCP's policy ensured employees to work part-time on medical grounds ("PTMG") over a 13-week period in order to gradually facilitate them a return to work from sick leave. This policy was applied to the specific case of Mr Higgins, who asked for an extension of the PTMG plan to 26 weeks. His request was refused and Mr Higgins was dismissed. Against this factual background, the first instance tribunal recognised that a blanket refusal to review the length of the plan beyond 13 weeks was a violation of the duty to provide reasonable accommodation. By contrast, the EAT overturned the tribunal's decision that did not properly identify the disadvantage which the adjustment was to avoid and did not assess to what extent the adjustment would have been effective to avoid the disadvantage.

3.3.1 *The EAT's approach to reasonable accommodation*

According to the EAT, in a case where the employer is alleged to be in breach of the duty to make reasonable adjustments imposed by section 20(3) of the 2010 Act, the Tribunal should identify: (i) the employer's provision, criterion or practice (PCP) at issue; (ii) the identity of the persons who are

[718] *Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins*, UKEAT0579/12/2510.

not disabled in comparison with whom comparison is made; (iii) the nature and extent of the substantial disadvantage suffered by the employee.[719]

In this case, the EAT properly found that the PCP was not merely the requirement to work, but rather the 13-week rehabilitation period in the procedures. The EAT argued that the concept of a PCP is excessively wide. Indeed, according to the Code of Practice on Employment (2011), it "is not defined by the Act but should be construed widely to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions".[720] However, the EAT correctly stated that the requirement to work contractual hours was the real cause of the claimant's disadvantage, who asked to extend the PTMG plan from 13 to 26 weeks. By doing so, the claimant would have been ready to return to work. He indeed suggested that it was reasonable to review the PTMG plan up to 26 weeks as he would have known his full capacity of working by that time.

The identification of the employer's policy as a PCP may be viewed as correct as it puts the employee at a substantial disadvantage in comparison with other non-disabled employees who are more likely to return to their normal working hours at the end of the 13-week period. The EAT's interpretation of the obligation to make reasonable accommodation with regard to the nature and extent of the substantial disadvantage suffered by the employee will be discussed below

3.3.2 *What are those fundamental steps to prevent the employee's disadvantage?*

It appears controversial the EAT's decision according to which the PTMG plan did not violate the duty to make adjustments. The EAT found that it was not reasonable for Mr Higgins not to have started working the hours he was fit to do merely because the letter contained no provision for

[719] *Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins*, Appeal No. UKEAT/0579/12/DM, EAT, paragraph 26.
[720] *Ibid*, paragraph 33.

review.[721] The EAT noted that Section 20(3) of the new 2010 Equality Act requires the Tribunal to apply a fundamental test in order to assess whether an employer has the duty to make a particular adjustment. *The duty to take a step* is triggered "if it is a step which it is reasonable for the employer to have to take to avoid the disadvantage".[722] The 2010 Act however does not contain any provision that embodies those factors that determine whether it was reasonable for a person to have to take a particular step.[723] The Equality and Human Rights Commission's Code of Practice on Employment provides a list of "some of the factors which might be taken into account" when deciding what is a reasonable step for an employer to have to take. The first main factor is "whether taking any particular steps would be effective in preventing the substantial disadvantage".[724]

The EAT concluded that that the Tribunal failed to address to what extent the step or steps taken by the employer would have been effective in preventing any substantial disadvantage caused by the PCP. The EAT indeed did not consider *an essential step* for Jobcentre Plus to ensure, at the beginning of the 13-week rehabilitation plan, the review and extension of this period. The EAT did not recognise the effectiveness of this step in preventing disadvantages to Mr Higgins because "if, at the end of the period, the employee continues to be under a substantial disadvantage, the duty to make an adjustment will still be applicable and can be judged in the circumstances at that time".[725]

[721] *Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins,* Appeal No. UKEAT/0579/12/DM, EAT, paragraph 55.
[722] *Ibid,* paragraph 49.
[723] It is worth noting that the "key events in this case occurred shortly after the coming into force of the 2010 Act on 1 October 2010. Prior to that date the duty to make reasonable adjustments was governed by the Disability Discrimination Act 1995. The 1995 Act contained, within section 18A(1), a statutory direction to have regard to certain factors in determine whether it was reasonable for a person to have to take a particular step. One of these factors was "the extent to which taking the step would prevent the effect in relation to which the duty is imposed". See paragraph 51 of *Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins.*
[724] Equality Act 2010 Code of Practice, Employment Statutory Code of Practice, paragraph 6.28.
[725] *Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins,* Appeal No. UKEAT/0579/12/DM, EAT, paragraph 56.

3.3.3 *A controversial understanding of reasonable accommodation*

The EAT's reasoning may be criticised as it deprives the 'duty of taking reasonable steps' for an employer of its original and rational purpose. The steps should be indeed taken to effectively prevent the effects of those substantial disadvantages which discriminate the employee.[726] They are therefore required by the Equality Act to determine whether an employer has the obligation to make a particular adjustment. It seems evident that the underlying objective of this duty is to *prevent* potential disadvantages and discriminatory barriers for the disabled worker before they concretely materialise. In this regard, it would have been appropriate to preventively consider whether the adjustment would alleviate or avoid the alleged substantial disadvantage. The "properly constructed phased return to work" proposed by the employee would have alleviated or avoided the alleged substantial disadvantage. By contrast, a 13-week period without reviews would have not prevented the substantial disadvantage at the end of such period. The Equality and Human Rights Commission's Code of Practice on Employment expressly refers to the word '*preventing*' to identify the reasonable steps. By doing so, it aims to reinforce the duty to provide reasonable accommodation and anticipating the legal protection before the criterion put the disabled worker at a substantial disadvantage in comparison with others.

It seems clear that UK judges are interpreting the 2010 Equality Act on the basis of a legal approach that only requires a *reactive* duty in the field of employment. It is worth noting that the 2010 Equality Act fails to specify what those factors to assess are, if it is reasonable for an employer to take a particular step to accommodate the needs of persons with disabilities. This gap can be filled by taking into account the provisions of the Equality and Human Rights Commission's Code of Practice on

[726] According to paragraph 6.28 of the Equality and Human Rights Commission's Code of Practice on Employment, the following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take: "whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer's financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and the type and size of the employer".

Employment which provide clear guidelines concerning the meaning of reasonable steps. The Code of Practice also emphasises that the duty to make reasonable adjustments requires employers to take *positive steps* to ensure that disabled people can access and progress in employment.[727] This approach goes beyond the aim to achieve formal equality by simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably. It expressly means "taking additional steps to which non-disabled workers and applicants are not entitled" in order to ensure substantive equality in the workplace.[728] This understanding of the concept of reasonable accommodation properly reflects the values and legal commitments of the CRPD which has crystallised the shift from a formal to a substantive paradigm of equality under international human rights law. The main flaws affecting UK equality legislation will now be summarised in light of the case law analysed above.

3.4 The 2010 Equality Act: Gaps and missed opportunities

The Equality Act has been introduced to simplify, harmonise and improve British equality law by bringing together over 116 separate pieces of legislation into one single Act.[729] In this regard, important provisions have been adopted such as a comprehensive definition of discrimination which now applies to all protected characteristic, the positive duties on public authorities to promote equality for of all protected grounds and the obligation of public authorities to take into account socio-economic disadvantages when taking strategic decisions.[730] Despite that, the UK legal framework concerning reasonable accommodation shows some flaws that might generate uncertainty in relation to the identification of those arrangements that should be provided by the employer to accommodate workers with disabilities.

It may be argued that the new 2010 Equality Act has not significantly improved the protection of persons with disabilities in the workplace in comparison with the previous Disability Discrimination

[727] Chapter 6 of Equality and Human Rights Commission's Code of Practice on Employment, paragraph 6.1.
[728] *Ibid*, paragraph 6.1.
[729] B. Hepple, The New Single Equality Act in Britain (2010) 5 *The Equal Rights Review* 24.
[730] *Ibid*, p.11.

Act. It does not provide an anticipatory obligation to make reasonable adjustments and fails to introduce a list of such accommodations. The responsive nature of this obligation has the effect to provide tailored solutions for those individuals who seek the adjustment, but it does not ensure an accessible working environment for all workers with disabilities. The reactive duty does not require any steps to remove the external barriers before the actual appearance of a person with disabilities. Furthermore, the Equality Act does not indicate those fundamental factors which might be taken into account when deciding what a reasonable step for an employer to have to take is. UK judges therefore find several obstacles in interpreting and applying the obligation to make reasonable accommodation in compliance with the substantive model of equality. By contrast, the Code of Practice, elaborated by the Human Rights and Equality Commission, represents an invaluable technical guide to understand the Equality Act and to apply it in practice. However, it seems that UK courts are overlooking the main guidelines enshrined in the Code of Practice when interpreting the meaning of reasonable steps to make adjustments in the workplace for employees with disabilities. The goal of effectively *preventing* the substantial disadvantage included in the Code of Practice appears to be incompatible with the mere *reactive* duty included in the Equality Act.

Moreover, UK courts still avoid referring to the CRPD when deciding national cases related to persons with disabilities. It is worth noting that the UK ratified the CRPD in 2009, but it has never been incorporated in domestic law.[731] The UK Government has stated that "the Convention is not legally binding in domestic law in the UK but is given effect through the comprehensive range of existing and developing legislation, policies and programmes that are collectively delivering the Government's vision of equality".[732] The lack of a domestic act that expressly incorporates the CRPD may therefore slow down the implementation of international human rights law. The UK is characterised by a dualist legal system which requires a domestic piece of legislation to give direct

[731] UK Independent Mechanism, Disability rights in the UK: UK Independent Mechanism Submission to inform the CRPD List of Issues on the UK (February 2017).
[732] Office for Disability Issues HM Government, UK Initial Report on the UN Convention on the Rights of Persons with Disabilities (2011).

enforceability to international law. Against this legal context, UK judges may be reluctant to explicitly refer to and rely on the CRPD's provisions in judicial cases that affect the rights of persons with disabilities. By doing so, the protection of persons with disabilities under the current human rights legal framework risks to be extensively lowered. However, it is worth noting that the UK's ratification of the Convention set out a clear obligation to interpret national legislation in compliance with the provisions enshrined in the CRPD. UK courts should therefore align their interpretation of existing legal norms with the CRPD's value and legal framework.

4. Italian law and the obligation to provide reasonable accommodation

The Italian legal framework does not provide a comprehensive and coherent piece of legislation that ensures equality and non-discrimination for persons with disabilities. It is instead characterised by several regulations that take into account different aspects of the protection of persons with disabilities.

Law 68/99 on the right to employment for people with disabilities (Norme per il diritto al lavoro dei disabili) promotes work placement and work integration of people with disabilities by supporting services and targeted employment. It provides rules based on the principle of placement of people with disabilities which respects their working capacities without penalising the employing company. According to Article 18, companies with more than 15 employees must employ workers with disabilities in accordance with a quota system (companies with 16 to 35 workers must employ one person with disabilities, companies with up to 50 workers, two people with disabilities, and with more than 50 workers, a number of people with disabilities equivalent to 7% of the total number of employees).[733]

[733] Legge 12 marzo 1999, n. 68, Norme per il diritto al lavoro dei disabili (G.U. n. 68 del 23 marzo 1999, s.o. n. 57) *come modificata dal decreto legislativo 14 settembre 2015, n. 151.*

It is worth noting that until 2013, Italian equality law lacked a specific provision concerning the obligation for employers to ensure reasonable accommodation.[734] The Legislative Decree no 216 of 9 July 2003, transposing the Directive 2000/78 that establishes a general framework for equal treatment in occupation and employment, failed to introduce the obligation to provide reasonable accommodation. However, the Italian legal system recently experienced crucial developments with regard to the protection of persons with disabilities following an adverse ruling in Case C-312/11 *Commission c. Italia*.[735]

In this case, Italy was found to have failed to comply with its obligations under EU law. In particular, Italy omitted to transpose Art. 5 of Directive 2000/78/EC concerning the reasonable accommodations for disable persons within the national legal system.[736] The Court held that "Italy has transposed the directive into its national law without ensuring that the guarantees and adjustments provided for regarding the treatment of persons with disabilities in the workplace are to apply to all persons with disabilities, all employers, and all aspects of the employment relationship".[737]

As result, the Italian government adopted the "Decreto Lavoro" in order to comply with the CJEU's judgement and expressly introduced the duty to provide reasonable accommodations for persons with disabilities in the work environment.[738] The new Article 3-bis of Decreto Legislativo 216/03 lays down that "in order to guarantee the principle of equal treatment, public and private employers have the obligations to adopt reasonable accommodations in accordance with the UN CRPD", but this is to be done "without imposing new costly burdens on the financial budget" as far as public employees are concerned.

[734] Decreto Legislativo 9 luglio 2003, n. 216 "Attuazione della Direttiva 2000/78/CE per a parità di trattamento in materia di occupazione e di condizioni di lavoro".
[735] Case C–312/11 *Commission v Italy*, EU:C:2013:446.
[736] L. Waddington, G. Quinn and E. Flynn (2013) 4 European Yearbook of Disability Law.
[737] Case C-312/11 *Commission v Italy* (2013) CJEU 446.
See also, A. Bogg and C. Costello, *Research Handbook on EU Labour Law* (2016), p. 490.
[738] Decreto-legge 28 giugno 2013, n. 76 (Gazzetta Ufficiale - Serie generale - n. 150 del 28 giugno 2013), converted in law by the Legge 99/13.

This legal response to the CJEU's adverse ruling is positive and shows the political willingness to promptly and formally comply with EU obligations. Nonetheless, Italian law does not explicitly emphasise a comprehensive and substantive commitment to provide reasonable accommodation. Employers are indeed exempted from implementing those arrangements that require new costly measures in terms of financial and human resources. Moreover, the law fails to indicate a list of such adjustments and does not provide any definition of reasonable accommodation. This 'minimal' approach may create uncertainty when employers or judges are called to assessing the reasonableness of those accommodation claimed by employees. Despite that, the new Article 3-bis of Decreto Legislativo 216/03 mentions that the obligation to provide reasonable accommodation must be applied in line with the CRPD. This express reference to the Convention is highly relevant and may represent the legal ground to invoke the enforceability of the CRPD in the domestic legal system.

The Italian case law regarding the duty to provide reasonable accommodation will now be examined. The aim is to identify the main differences between the UK and Italy with regard to the obligation to accommodate persons with disabilities in the workplace. The question of whether Italian equality law complies with the CRPD's provisions will also be answered.

4.1 The case of *GC v L. SRL:* facts and findings

The case of *GC v L. SRL*[739] is highly interesting because it shows that the denial of adopting reasonable accommodation or the dismissal of an employee resulting from the lack of reasonable accommodation constitutes a specific form of discrimination.[740]

The claimant was fired as she was considered unable to perform her job as warehouse handler and unavailable to be delegated to different tasks. She claimed that the dismissal breached the duty to provide reasonable accommodation according to Directive 2000/78 and Decreto-Legge 76/2013. By

[739] *CG v L. SRL*, Tribunale Pisa, Ordinanza 16 aprile 2015.
[740] A. Maino e M. Serra, I ragionevoli accomodamenti e i divieti di discriminazione in base alla disabilità (2016) 20 *Segni Giuridici* 65.

contrast, the employee agreed with the occupational doctor's findings according to which she is incapable of performing several tasks (requiring material handling or exposure to vibration) and highlighted the lack of other available posts she could be transferred to.

The Court first found that the claimant fell under the definition of disability developed by the CJEU in the case of *Skouboe Werge* as she was suffering from Raynaud's disease.[741] The Court emphasised that the concept of 'disability' must be also understood as referring to a hindrance to the exercise of a professional activity, not only, to the total impossibility of exercising such an activity. The Court therefore concluded that the employer has the duty to provide reasonable accommodation for the employee with disabilities who cannot perform his work on equal basis with others. In this regard, the Court underlines that that obligation covers all employers and "it is not sufficient for Member States to provide support and incentives".[742] They must require all employers to adopt effective and practical measures, where needed in particular cases, to adapt the workplace to persons with disabilities.

It is worth noting that the Italian Court expressly referred to Article 2 of the CRPD that defines the concept of reasonable accommodation and to the Framework Equality Directive's provisions concerning the duty to make appropriate measures to adapt the workplace to the disability.[743] By

[741] Cases C-335/11 and C-337/11, CJEU: "the concept of disability must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one".

[742] Judgement of the Court (Fourth Chamber) of 4 July 2013 – *European Commission v Italian Republic*, (Case C 312/11), para. 62.

[743] *CG v L. SRL*, Tribunale Pisa, Ordinanza 16 aprile 2015: "Ed a norma dell'art. 2 della Convenzione, per accomodamenti ragionevoli devono intendersi le modifiche e gli adattamenti necessari ed appropriate che non impongano un onere sproporzionato o eccessivo adottati, ove ve ne sia necessità in casi particolari, per garantire alle persone con disabilità il godimento o l'esercizio, su base di uguaglianza con gli altri, di tutti i diritti umani e delle libertà fondamentali. Mentre il ventesimo ed il ventunesimo considerando della direttiva 2000/78 prevedono l'introduzione di misure appropriate, ossia misure efficaci e pratiche destinate a sistemare il luogo di lavoro in funzione dell'handicap, ad esempio sistemando i locali o adattando le attrezzature, i ritmi di lavoro, la ripartizione dei compiti o fornendo mezzi di formazione o di inquadramento".

doing so, the judge recognised the enforceability within the domestic system of those fundamental provisions of international and EU law that address the rights of persons with disabilities.

4.1.1 *Defining the nature of reasonable accommodation*

The Court properly identified the nature and the scope of the duty to make reasonable accommodation. It stated that the employee has the burden to prove that the adoption of reasonable adjustments would be ineffective to accommodate and advance the rights of persons with disabilities in the workplace. This means that those practical measures to adapt the workplace to the disability would not be sufficient to enable a disabled employee to have access to, participate in, or advance in employment, or to undergo training without putting his/her health at risk. Whether the employer fails to demonstrate the 'uselessness' of such measures, the dismissal of the worker with disabilities cannot be regarded as lawful. Therefore, the link between the inefficacy of reasonable accommodation and the subsequent justified dismissal is a necessary legal requirement that the employer has to prove.

Against this background, the Italian judge pointed out the *objective* and *functional* nature of the duty to provide reasonable accommodation in compliance with the prohibition of discrimination under EU law. By applying this approach, the Court found that the company structure could adequately be adapted to the needs of the disabled employee without causing disproportionate burdens for the employer and risks for the employee's health. The employer should have redistributed the tasks between those employees with the same qualifications and allocate the claimant to a different post in the warehouse. This measure would have ensured a balanced and efficient company structure and the possibility to work for the disabled employee.[744]

This judicial interpretation reflects the main objective of the duty to make adjustments that aims at facilitating the achievement of equality in the workplace. This approach is in line with the CRPD's

[744] *CG v L. SRL*, p. 9.

scope and the obligations under EU law according to which making adaptations is no longer a mere charitable goal but constitutes a legally enforceable right for persons with disabilities.[745]

The most relevant findings of the above judgement will now be briefly summarised and examined to identify the impact of international and EU law on the judicial interpretation of the concept of reasonable accommodation.

4.1.2 *International, EU and national law: a positive approach of the Italian Court*

The judgement in the case of *CG v L. SRL* symbolises a significant development with regard to the implementation of equality law in the Italian legal system which has experienced important changes in the last years. The duty of making reasonable adjustment in the workplace was introduced only in the 2013 by means of the Decreto Lavoro. This obligation was previously absent in the national legal framework and the Italian government was forced to adapt its domestic legislation to the obligations of EU law following the CJEU's judgement in *European Commission v Italian Republic*.

In addition, Italy ratified the CRPD in 2009 and committed to improve the rights of persons with disabilities at national level. However, Italian law does still not provide any operational definition of reasonable accommodation and any example of such adjustments.[746] The UN CRPD Committee, in its concluding observations on the initial report of Italy, was concerned that the legislation "lacks a definition of reasonable accommodation and does not include an explicit recognition that the denial of reasonable accommodation constitutes disability-based discrimination".[747] It therefore recommended to "adopt a definition of reasonable accommodation aligned with the Convention, and

[745] V. Della Fina, R. Cera, G. Palmisano, The United Nations Convention on the Rights of Persons with Disabilities: A commentary (Springer International Publishing 2017), p. 169.
[746] R. Albano, E. Ballocchi, Y. Curzi, P. M. Torrioni, *Mutamenti nel diritto al lavoro delle persone con disabilità. Un processo di civilizzazione incompiuto* (2016) 3 Osservatorio MU.S.I.C Working Paper, p. 32.
[747] Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Italy, 6 October 2016, CRPD/C/ITA/CO/1. Para. 9.

enact legislation that explicitly recognises the denial of reasonable accommodation as disability-based discrimination across all areas of life, including within public and private sectors".[748]

It may be said that this legal framework appears highly confusing and fragmented as it does not set out a comprehensive regulation in terms of equality and non-discrimination. Nevertheless, the Italian Court, in the case of *CG v L. SRL*, fully embraced a substantive understanding of equality which acknowledges the functional role of the duty to provide reasonable accommodation for persons with disabilities in the workplace. It filled the mains gaps of the 'minimalist' approach that characterises Italian law to combat discrimination by expressively mentioning and implementing the provisions of international and EU law.

The Court's interpretation seems to encompass those recent constitutional developments that concern the interplay between supranational and domestic law in the Italian legal system. The Italian Constitutional Court, with regard to the efficacy of the European Convention of Human Rights in the national legal system, indeed stated that international obligations must be considered as "interposed standards" (norme interposte) between the Constitution and ordinary law.[749] This concept implies the primacy of international law on the basis of which the constitutionality of national law must be evaluated.[750] This judgement clarified the meaning of the amendment introduced in 2001 to Article 117 of the Italian Constitution according to which: "the legislative power belongs to the state and the regions in accordance with the Constitution and within the limits set by European Union law and international obligations".

This legal framework outlines that EU law has a direct effect in the domestic system and it can be directly applied by ordinary judges. Italy, by signing and ratifying the European treaties, has joined a supranational legal order and conferred relevant legislative powers to the European Union subject

[748] *Ibid*, para. 10.
[749] F. Biondi Dal Monte and F. Fontanelli, The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System (2008) 9 *German Law Journal* 890.
[750] The Decisions No. 348 and 349/2007 of the Italian Constitutional Court.

to the respect of the fundamental constitutional principles of the Italian order. By contrast, the provisions of multilateral international treaties, such as the CRPD, cannot be directly applied in the domestic system and do not generate a new legal order.[751] This means that international law obligations only represent interposed standards of review of domestic legislation. International treaties, having an "infra-constitutional" rank, are placed between ordinary law and constitutional law. As a result, ordinary judges lack the power to directly nullify national laws which do not comply with international norms, but retain the possibility to initiate a procedure before the Constitutional Court to assess the indirect violation of Article 117 of the Constitution.

It may be said that this context provides fertile and positive grounds to promote the implementation of international treaties in the domestic system. The "infra-constitutional" nature of international treaties does not admit the disapplication by ordinary judges of internal norms in conflict with international law. The violation of international norms by a domestic statutory norm implies its unconstitutionality and it can be exclusively declared by the Italian Constitutional Court. The supremacy status of international norms over conflicting national laws is however recognised. Ordinary judges are therefore more prone to take into account norms of international treaties when interpreting and applying national legislation. In the case of *CG v L. SRL*, the Italian judge expressly mentioned the CRPD and Directive 2000/78 to fill the legal gap stemming from the lack of a definition of the concept of reasonable accommodation under national law. The explicit reference to the CRPD contributed to align the judicial interpretation of the obligation of reasonable accommodation towards the provisions of international human rights law.

The analysis will now focus on other domestic cases that concern the judicial implementation of the duty to provide reasonable accommodation. The objective is to carry out a broad assessment of the

[751] The Decisions No. 348 and 349/2007 of the Italian Constitutional Court, para. 3: "the Convention does not set up a supranational legal order, thus it does not produce norms that have a direct applicability in State Parties."

judicial understanding of this obligation and identify the prevailing approach towards the concept of reasonable accommodation in Italy.

4.2 The first instance Court and the assessment of the proportionality of reasonable accommodation

The first instance Court of Bologna was called to decide whether the refusal of a hospital (Azienda Ospedaliero-Universitaria Policlinico S. Orsola Malpighi) to for six months hire a nurse who was unable to work during night shifts could be considered a discriminatory treatment.[752] This case took place in 2013 before the formal implementation by the Italian government of the duty to provide reasonable accommodation according to Directive 2000/78.

The hospital opened a selection to hire nurses for a period of six months in order to cover other workers on leave. The selection expressly required the unconditional physical ability to carry out the specific tasks of the job. The claimant applied for the post and was declared eligible for the job, but the medical prescription stated that he/she was not able to work in night time. The hospital therefore did not conclude the contract with the claimant who claimed that the refusal was in breach of Directive 2000/78. The Court had to clarify if the physical conditions of the claimant could justify the refusal of the hospital to hire him/her.

It is worth noting that the Court explicitly highlighted the importance of referring to supranational norms in order to solve domestic interpretative issues and fill legal gaps.[753] In doing so, it recalled the leading definition of disability elaborated by the CJEU in the famous case of Ms Ring and Ms Skouboe Werge to assess whether the claimant could be considered as a disabled person.[754] Moreover,

[752] N.R.G. Lav. 171/2013, Tribunale Ordinario di Bologna, Sezione Lavoro.
[753] *Ibid*, "La sentenza della Corte di Giustizia consente, per altro, di risolvere i problemi interpretativi". "I medesimi principi ricavabili dall'art. 5 della direttiva 2000/78/CE si trovano nella ricordata convenzione ratificata dallo Stato e, conseguentemente, devono essere utilizzati dal Giudice nazionale".
[754] CJEU, 11 April 2013. Judgement in Joined Cases C-335/11 and C-337/11.

it mentioned the social model of disability embraced by the CRPD and the concept of reasonable accommodation as defined by its Article 2. The Italian Court seems to acknowledge the influential role of international and EU law in the national legal system when interpreting vague and incongruous domestic norms in the field of equality and non-discrimination. The interpretative difficulties generated by the lack of specific legal provisions at national level have been positively overcome through the implementation of those precise and coherent supranational norms that regulate the rights of persons with disabilities.

In this case, the crucial issue was the identification of the proper reasonable accommodation. With regard to Article 5 of Directive 2000/78, the Court emphasised that national judges have the competence to evaluate if the reduction of the patterns of working time may represent an accommodation giving rise to a disproportionate burden for the employee. To this end, the Court took into account two main conditions: the contractual typology of the job (a short-term contract of six months) and the general working context (the hospital had more than 4000 workers). By considering these two factors, it concluded that a working shift of 12 hours exclusively in the day time would not have caused a disproportionate burden for the employer and would not have affected the patterns of working time of other workers. As a result, the employee had the duty to accommodate the claimant with disabilities and provide a change of the patterns of working time in accordance with Article 5 of Directive 2000/78. The refusal to conclude the contract was therefore a discriminatory treatment by virtue of the violation of the duty to provide reasonable accommodation on the workplace.

This judgement remarkably hails the ratification of the CPRD by the Italian government and the integration of its provisions in the domestic system. The judicial understanding of the obligation to accommodate workers with disabilities properly follows those standards and provisions developed at international and EU levels. The first instance Court of Bologna indeed assessed the proportionality of the accommodation by taking into account the 'size' of the hospital in terms of human resources and the potential impact of the adjustment on other employees. The law does not specify any

guidelines to evaluate whether the accommodation gives rise to a disproportionate burden to the employee. The Court however did not apply a mere cost-benefit analysis seeking to assess "the cost of reasonable accommodation in relation to a perceived benefit to the employer and the employee".[755] By contrast, it considered not only the financial implications for the employer that has to provide reasonable accommodation with regard to a short-term contract of six months, but also the effects of such adjustment on others workers. This approach moves beyond the traditional assessment of the perceived benefit to the employer and employee by emphasising the potential impact of the specific adjustment on the entire company's organisation and structure. The Court's reasoning aims at avoiding discriminatory decisions and advances a balanced approach that includes several factors, such as the size of the organisation, the impact of the measure on the employee and its effect on other workers. The Court, when determining if an accommodation would have entailed a disproportionate or undue burden, correctly assessed the proportional relationship between the means employed and the final aim of ensuring the enjoyment of the right concerned.[756]

Another case concerning the duty to provide reasonable accommodation will now be examined and the extent to which such an obligation is applied in the national legal system will be reviewed. By highlighting the main differences between the dominant approach in British and Italian courts regarding the concept of reasonable accommodation, this research will be able to identify the impact of the CRPD at national level.

4.3 The link between the dismissal of an employee and the duty to accommodate

Case n. 442/2015 R.G. regards the unlawfulness of the dismissal of an employee that suddenly become physically unable to perform his/her job.[757] The claimant was indeed fired by the company

[755] United States Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, 2002, para 45.
[756] See for instance the Report of the Office of the United Nations High Commissioner for human Rights, Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities, A/HRC/43/26.
[757] Case N. 445/2015 r.g., Tribunale di Ivrea, Ordinanza 21.02.2016.

Officine Meccaniche Piemontesi s.r.l as soon as she was found unable to carry out her usual tasks. She claimed that the dismissal was unlawful because her inability was caused by insalubrious working conditions and by the lack of adjustments to avoid occupational diseases. The claimant argued that the company could have provided reasonable accommodation to enable her to perform the job or she could have been allocated to a different position. The first instance Tribunal of Ivrea found that the claimant falls under the definition of disability developed at EU level and subsequently she could enjoy the legal protection under Italian law that sets out the duty to provide reasonable accommodation on the workplace.

The Tribunal of Ivrea stated that the notion of reasonable accommodation includes all those measures that are necessary to prevent the dismissal of an employee who becomes disabled. To this end, the employer has to modify the organisational structure of the company if the adjustment does not impose a disproportionate burden. Interestingly, the Court clarifies that this obligation affects and limits the employer's power to dismiss an employee.[758] The employer is thus entitled to lawfully fire an employee who becomes unable to perform his/her job only when all the necessary reasonable adjustments have been adopted according to Article 3 (3-bis) of Decreto Legislativo n. 216 of 2003. According to the Court, the obligation to provide reasonable accommodation is the cornerstone of the legal protection of workers with disabilities. This means that all the specific provisions within the Italian legal framework to safeguard the rights of workers should be interpreted and applied in compliance with the general rule that lays down the duty to accommodate. This approach seems to strengthen the protection of persons with disabilities as it tries to systematise the fragmented Italian law with regard to equality and non-discrimination. The obligation of making reasonable accommodation should be therefore considered as a "comprehensive and unifying clause" that brings together and shapes all the legislation concerning the rights of persons with disabilities. This Court's reasoning is to be welcomed as it embraces a substantive model of equality which recognises the

[758] *Ibid*: "L'adempimento di questo obbligo, gravante su ogni datore di lavoro, condiziona il suo potere di recesso".

central role of the provision of reasonable accommodation to ensure the enjoyment of fundamental rights on an equal basis with others.

In light of this correct background, the Court appropriately concluded that it is not sufficient for the employer to demonstrate the impossibility to transfer the employee to a different position. The employer has also to show that the necessary adjustments would bring about a disproportionate burden, as defined by Article 5 of Directive 2000/78. Moreover, the unreasonableness of such accommodation should be proved by means of rigorous and concrete evidences and by taking into account every possible solution to accommodate the worker with disabilities (transfer to a different post, modification of working shifts, organisational and material changes). In this specific case, the Court found that the adjustment required to accommodate the claimant would have meant a cost of almost 10.000 euro, less than the compensation offered by the company to the employee to conciliate the lawsuit. In addition, in view of the technical expertise, transferring the employee to a different position would have been feasible for the company's organisation and would have been compatible with the claimant's health conditions. As a result, the Court nullified the dismissal of the claimant and condemned Officine Meccaniche Piemontesi to reinstate the employee in her previous post.

This judgement is relevant because it shows that the judicial understanding of the concept of reasonable accommodation increasingly adheres to the international standards enshrined in the CRPD. The human rights approach developed at international level is gradually being correctly applied by national judges. The Italian Court properly identified that the link between the dismissal of an employee and the failure to provide reasonable accommodation is an essential legal requirement to declare the unlawfulness of such dismissal. This decision clearly fosters the rights of workers with disabilities as it also imposes the reinstatement of the employee in the original position. This framework positively promotes substantive equality by imposing precise and rigid obligations on the employer that cannot discriminate persons with disabilities in the workplace.

The next section will summarise the main findings of the comparative analysis concerning the implementation of the duty to accommodate persons with disabilities in the UK and Italy.

5. Findings and conclusions of the comparative analysis

The comparative analysis between the UK and Italy shows significant legal and judicial divergences with regard to the duty to provide reasonable accommodation. Three main issues will now be examined: the consistency and the effectiveness of the law, the judicial reasoning and the CPRD/EU law impact.

5.1 The consistency and the effectiveness of the law

From a normative point of view, it is worth noting that the UK has remarkably adopted an overarching piece of legislation that addresses discrimination on several grounds such as race, sex, disability, age, gender reassignment, marriage and civil partnership, religion or belief, sexual orientation, and pregnancy and maternity. This may be viewed as a remarkable development because it harmonises and extends the personal scope of UK equality law.

However, the Equality Act did not significantly improve the substantive content of the legal protection for persons with disabilities. The duty to provide reasonable accommodation in the workplace has not been reinforced by introducing a specific anticipatory obligation to remove those barriers that hamper the enjoyment of fundamental rights on equal basis with others. The reactive nature of the duty may generate relevant difficulties in implementing *ex-post facto* the reasonable adjustment required by the employee. The adjustment's request, the interactive dialogue between the employee and the employer to identify the proper accommodation and its effective realisation are steps that may reduce or nullify the reasonable accommodation's utility.

The 2010 Equality Act also lacks a list of reasonable accommodation and a provision setting out those guidelines to determine when or whether the employer has to take reasonable steps to avoid the

employee's disadvantage. The preventive identification and adoption of common legal standards to ensure that workers with disabilities are not discriminated against in the workplace would guarantee the effectiveness of the obligation to provide reasonable accommodation. It may be argued that this framework does not assure legal consistency and certainty in relation to the implementation of the duty to accommodate.

When compared to the UK approach, the Italian approach may be characterised as 'minimalist' when it comes to the obligation to provide reasonable accommodation. It indeed contains a single provision that merely refers to the duty to accommodate as defined under the CRPD. Moreover, the law does not set out any list of reasonable adjustments or guidelines to assess to what extent employers have to implement this obligation. It appears that the concept of reasonable accommodation for persons with disabilities is new for Italian equality law. This legal context shows evident gaps and may bring about uncertainty when employers are called to adopt reasonable accommodation. Italian equality law should be therefore systematised and harmonised through a comprehensive approach that ensure equality and non-discrimination to persons with disabilities. To this end, a new piece of legislation would be advisable in order to put together the different provisions concerning the protection of persons with disabilities. In particular, clear legal provisions defining the concept of disability and the main employer's obligations should be expressly introduced in order to facilitate the identification of reasonable accommodation.

The interpretation and application of the substantive content of the obligation to provide reasonable accommodation by British and Italian courts will now be summarised. The aim is to identify the correct understanding of the concept of reasonable accommodation.

5.2 Judicial reasoning

The case law analysis concerning the interpretation of the reasonable accommodation's duty reveals the emergence of two divergent approaches in the UK and Italy.

5.2.1 *Negative practices*

It may be said that British courts are gradually moving away from the remarkable decision handed down by the House of Lords in *Archibald.* In other words, the substantive model of equality has been set aside and replaced by the traditional formal paradigm of equality. Cases such as *Wade v. Sheffield Hallam University* and *Jennings v. Barts & The London NHS Trust* show that reasonable accommodations are still perceived more as a privilege rather than as a right for workers with disabilities.

In the case of *Wade v. Sheffield Hallam University,* the EAT held that it was not reasonable to remove the requirement for competitive interview and move the employee to a new position. The Court incorrectly disregarded the possibility to upskill the employee by providing those necessary trainings to reach the standards required for the job. The duty of making adjustments explicitly demands the transfer to an existing vacancy to effectively promote substantive equality. The nature of reasonable accommodation aims to ensure full equality in practice by adopting specific measures to prevent or compensate for disadvantages linked to disability.

Another crucial issue is that the EAT, in the case of *Jennings v. Barts & The London NHS Trust,* has not recognised that employer's absence policy should be tailored to persons with disabilities who are on long-term sick leave.[759] The EAT's judicial reasoning omits to consider that workers with a disability runs the additional risk of an illness connected with their disability and they are therefore more exposed to the risk of accumulating days of absence on grounds of illness. Absence management policies should take into account the specific needs of workers with disabilities in order to not place them at a substantial disadvantage in comparison with persons without disabilities. The EAT's decision in *Jennings v. Barts & The London NHS Trust* is not compatible with the provision

[759] See case examined above, *Jennings v. Barts & The London NHS Trust*.

prohibiting indirect discrimination when there is a practice, policy or rule which applies to everyone in the same way, but has a worse effect on some people than others.

The EAT in *Secretary of State for Work and Pensions v. Higgins* also concluded that the blanket refusal to review the plan designed to assist the person with disabilities in returning to work was not unreasonable.[760] This decision frustrates the scope of equality law and the nature of the obligation to provide reasonable accommodation. The objective of substantive equality is indeed to promote and facilitate the participation of persons with disabilities in the workplace. It may be said that UK courts are applying and interpreting the Equality Act in a controversial way that reduces the legal protection for persons with disabilities. The case law previously examined represent a critical shift away from the coherent reasoning of the House of Lords in *Archibald* and as noted above, this shift may be viewed as ill-advised because it moves back to a formal model of equality and a charity approach towards disability that does not address the issue of creating an inclusive working environment for persons with disabilities.

5.2.2 *Positive practices*

Against a 'fragmented' legal framework, which might generate confusion and uncertainty in relation to the rights of persons with disabilities, Italian judges positively embraced an *objective* and *functional* understanding of the duty to provide reasonable accommodation.

In the case of *CG v L. SRL*, the first instance Court of Pisa found that the employer should have allocated the worker with disabilities to a different position in the company, because this measure would have been reasonable both for the company organisation and the disabled employee. Moreover, the first instance Court of Bologna concluded that the refusal of a hospital to, for six months, hire a nurse who was unable to work during night shifts was discriminatory. The Court considered both the

[760] *Secretary of State for Work and Pensions v. Higgins.*

financial consequences for the employer and the effects of the adjustment requirement on other workers. This reasoning not only ensures the enjoyment of the right concerned, but also considers other fundamental factors such as the employer's needs and the company's structure. A feasible accommodation indeed must be necessary and proportional. In this regard, there are no guidelines under Italian law to assess the feasibility of an accommodation. However, Italian courts verified the impact of the measure on the financial capacity of the employee and its positive effects on the requested party and any other workers. This reasoning seems consistent and logical as it weights the necessity of removing a particular barrier for the worker with disabilities and the proportionality of the measure that should not impose an undue burden on the employer.

This judicial understanding of the obligation to provide reasonable accommodation represents a valuable practice that may contribute to align the Italian jurisprudential approach towards those international and EU standards for the protection of the rights of persons with disabilities. In order to determine whether an accommodation is reasonable, a case-by-case approach is needed, but it would be important to clarify some legal guideline for assessing the feasibility of the accommodation required. A cost-benefit analysis may bring about hypothetically discriminatory decisions.[761] Judges should therefore carry out a broader and functional analysis to assess the accommodation's feasibility by considering the size of the organisation, the cost of the accommodation, its impact on the general workplace and its positive effect for the employee.

5.3 The impact of International and EU law: protectionism vs legal integration?

In light of the case law previously examined, one may conclude that International and EU law have had a more relevant and significant impact in the Italian legal system rather than the British one.

[761] Human Rights Council, Equality and non-discrimination under Article 5 of the Convention on the Rights of Persons with Disabilities, (27 February-24 March 2017) A/HRC/43/26.

The pure dualistic system that characterises the UK legal framework jeopardises the enforceability of supranational norms. According to the so-called dualistic approach, international law and national law are two separate and independent legal orders, reciprocally isolated.[762] In the UK's dualistic system, an international treaty ratified by the Government must be incorporated by domestic legislation in order to produce effects into the national legal system. Otherwise national courts have no power to enforce the provisions included under international treaties.

Despite the CRPD's ratification by the UK, the lack of a national law incorporating the Convention does not allow its direct enforceability in the UK system. However, the CPRD may be a useful tool to interpret and apply the existing UK legislation in the field of human rights law and equality. UK courts instead do not make references to the Convention in order to interpret the concept of reasonable accommodation. At the judicial level, it may be argued that British judges are reluctant to apply the norms of the CPRD. This approach may not only lower the legal protection of persons with disabilities, but it is also detrimental in relation to those legal gaps affecting the 2010 Equality Act. This judicial reluctance may be legally justified because of the nature of the CRPD which does not have direct effects in the UK legal order. The absence of UK legislation incorporating the CRPD should not however refrain UK judges from referring to international norms as an aid to their interpretation of domestic law. This emerging hesitancy is not acceptable as it deprives persons with disabilities of those fundamental rights enshrined in an international legal instrument to which the UK is party. The British courts' approach may be seen as 'protectionist' as it resembles a dualistic view that emphasises the primacy and independence of the legal system of one's own state. International law and domestic law are both recognised as valid systems, but they are still considered as distinct legal orders. By doing so, it *protects* domestic law from the interference and influence of

[762] See H. Kelsen, *Introduction to the Problems of Legal Theory* (Clarendon Press, Oxford, 1992), p. 111 and also A. Cassese, *International Law* (Oxford University Press, 2005), p. 213.

supranational norms. The interplay between international and national law is highly narrowed by the lack of reference to international norms by UK courts.

With regard to the impact of EU law, it is important to underline that Directive 2000/78 has been implemented before by the Disability Discrimination Act 1995 and subsequently, by the Equality Act 2010. In *Paterson v. Commissioner of Police of the Metropolis,* the EAT said that UK legislation must "be interpreted so as to give effect to the Directive".[763] In particular, this implies that British courts should interpret the Equality Act in compliance with EU law when it is unclear. It is also worth noting that the Directive 2000/78 must be interpreted in line with the CPRD as already clarified by the CJEU. Against this legal background, UK judges have the obligation to refer to EU law in order to address the main legal flaws concerning the protection of persons with disabilities under UK law. For instance, courts may take into account Directive 2000/78 to properly identify the nature of reasonable accommodation and the substantive scope of disability equality law. However, the case law analysis outlines that UK judges still hesitate to expressly refer to the provisions of EU equality law when the Equality Act is not sufficiently clear. It may be concluded that the UK judiciary is being characterised by the emergence of a 'protectionist' approach with regard to supranational law that limits the impact of EU and International law in the domestic system.

The Italian case law shows a more positive and open approach towards supranational norms in comparison with the UK one. The existence of a written constitution which shows a formal openness to supranational norms positively promotes the integration of the CRPD in the Italian legal order. The CRPD is gradually impacting the judicial interpretation of domestic law that concerns the rights of persons with disabilities. Italian judges are more likely to explicitly refer to the provisions of the CRPD when deciding complicated issues that are poorly regulated at national level. This approach reflects the fact that international obligations have an "infra-constitutional" nature and must be

[763] *Paterson v. Commissioner of Police of The Metropolis* [2007] UKEAT (23 July 2007).

considered as interposed standards between the Constitution and ordinary law. The unity of international law and domestic law is therefore based on the primacy of the Italian constitution.

Italian judges expressly mention CJEU's judgements and Directive 2000/78 to solve those interpretative issues caused by the lack of specific legal provisions under Italian law defining the concept of reasonable accommodation. The above analysis reveals that Italian judges consider EU law as a valuable tool to decide those domestic cases affecting the rights of persons with disabilities on the workplace. This approach remarkably promotes a unified system of norms and the *integration* of the CRPD within the Italian legal framework. It differs from the judicial reasoning of UK courts which *protect* the UK legal order from the potential influence that the CRPD might have on the interpretation of the duty to accommodate persons with disabilities.

"To deny people their human rights is to challenge their very humanity."
Nelson Mandela, South African civil rights activist

CHAPTER 7

CONCLUSION

1. The EU legal framework: main findings

The main findings of this research concern the impact of the CPRD on the EU legal framework. It has been shown that: i) the CJEU is failing to apply the social model of disability enshrined in the CRPD; ii) the CJEU's understanding of multiple and intersectional discrimination is not fully in line with the substantive model of equality; iii) the CJEU is embracing a 'protectionist' and 'minimalist' approach with regard to the status of the CRPD in the EU legal order.

1.1 The definition of disability: a missed opportunity

The CJEU has gradually departed from the remarkable approach towards the definition of disability adopted in the case of *Ring and Skouboe Werge*. In this case, the CJEU positively hailed the social model of disability endorsed by the CRPD by focusing its analysis on those external barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers. The Court's reasoning was highly significant as it thoroughly clarified the personal scope of the Directive 2000/78 which lacks a comprehensive definition of disability in line with the CRPD's provisions. The CJEU rightfully sets out that disability does not require the complete impossibility of working, but it does imply a hindrance to the exercise of a professional activity. The CJEU's understanding of the prohibition of discrimination on grounds of disability complied with the Directive's objective to enable persons with disabilities to have access to or participate in employment. This interpretation marked a crucial development in comparison with the judicial understanding of disability in *Chacón Navas*, when the CJEU applied an obsolete medical model of

disability. The CJEU, for the first time, delineated and implemented a *flexible* and *social* construct of disability which considers the interplay between individual impairments and external barriers.

At first glance, it may be said that the CRPD has positively influenced the interpretation and implementation of EU equality law. However, the 'progressive' stance adopted in *Ring and Skouboe Werge* with regard to equality norms has not been confirmed in the most recent judgements of the CJEU. In the case of *Kaltoft*, the CJEU had to decide whether obesity can be considered a disability covered by the Directive 2000/78/EC. The CJEU's reasoning wrongfully focused on the physical constraints of the claimant to evaluate whether he fell within the Directive's personal scope. This judgement symbolises a controversial step back with regard to the interpretation of the concept of disability. The Court disregarded the interactions between the claimant's personal characteristic and the external barriers that hinder his full participation in professional life. By doing so, the CJEU restored the medical model of disability in EU equality law by classifying disability as a medical condition merely located within the individual.

The failure to apply the social model of disability is also evident in the case of *Z.* where the Court concluded that the impossibility to have a child by conventional means does not in itself prevent the commissioning mother (the claimant) from having access to, participating in or advancing in employment. The Court pointed out that "it is not apparent from the order for reference that Ms Z.'s *condition* by itself made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity". The Court once again referred to the medical definition of disability and concentrated its analysis on the personal characteristic of the claimant to trigger the protection of the Directive 2000/78.

The CJEU's problematic assessment of the concept of disability was ultimately demonstrated in the case of *Glatzel.* The Court based its reasoning principally on the nature of the individual impairments (the claimant suffered from unilateral amblyopia) and the medical standards required by the Directive

2006/126 to release a driving licence. The Court incorrectly abandoned a social model understanding of disability according to which disability must not be exclusively understood with regard to the *degree of the deficiency at issue*, but must be determined on the basis of the *final outcome provoked by* that deficiency in a given social context.

This case law analysis exhibits that the CJEU shifted its understanding of disability from a social model to a medical approach which still defines functional limitations as the final result of a physical condition. The CJEU missed the opportunity to provide a legal definition of disability which reflects the social contextual model adopted by the CRPD.

1.2 The legal gaps in addressing multiple and intersectional discrimination

The CJEU adopted an inadequate approach to address discrimination based on multiple grounds. The CJEU's reasoning related to the legal protection of women with disabilities echoes the main gaps of EU equality law which is characterised by a single-ground equality paradigm. In particular, EU equality norms fail to contemplate the disability dimension of gender discrimination or the gender aspect of disability discrimination. In the case of *Z*, the Court denied legal protection to a woman who suffered from discrimination on multiple and different grounds. In the same judgement, the CJEU ruled that there was no sex or gender discrimination, no disability discrimination and no violation of EU provisions concerning maternity leave. This judgement proves that the lack of adequate legal instruments which recognise the intersection of two or more grounds of discrimination jeopardise the effective protection of vulnerable individuals.

The main flaw of EU law derives from the impossibility to group multiple grounds of discrimination in the same claim. In the case of *Z.*, the claimant was obliged to bring an allegation of sex discrimination separately from the allegation of disability discrimination. This framework impedes determining the inextricable link between the two grounds that brings about discrimination. As a result, the claimant, as a woman with disabilities, was not able to find protection under the Equal

Treatment Directive and the Framework Equality Directive. The Court found that a commissioning father was not entitled to such leave either and that the refusal did not put female workers at a particular disadvantage compared with male workers. Similarly, it did not find the situation experienced by Z. to fall within the personal scope of Directive 2000/78 that prohibits discrimination on grounds of disability. The Court wrongfully applied a comparison with male workers, instead of comparing it to a woman who has given birth or an adoptive mother.

It is clear that EU law does not provide the necessary legal tools to identify the proper comparator and tackle multiple and intersectional discrimination. This is strongly linked with a 'formal' comparative analysis that merely requires the identification of an adequate group with whom to carry out a comparison with the disadvantaged individual. This approach is very limited as it narrows the possibilities to combat multiple and intersectional discrimination.

1.3 The substantive equality paradigm under the CRPD

This research found that the substantive model of equality adopted by the CRPD has not yet been incorporated in the EU legal framework. The CPRD provides an innovative and consistent legal framework to tackle discriminations. It has pioneered a line of fundamental substantive 'equality-promoting' provisions that may improve the legal protection of persons with disabilities: i) the prohibition of direct and indirect discrimination (Art. 2); ii) the obligation to provide reasonable accommodation (Art. 5.3); iii) the objective to promote multidimensional equality (Arts. 6 – 7) and iv) the duty to launch affirmative action programs (Art. 27). The CPRD abandoned the formal model of equality (also known as 'sameness' or 'symmetrical' approach) and instead opted in favour of a substantive approach according to which individuals in different situations should be treated differently. This new paradigm requires to accommodate the concrete differences of persons with disabilities not only by considering their biological characteristics, but also by removing those environmental, attitudinal and legislative obstacles that jeopardise their full enjoyment of human

rights. Substantive equality demands an active role of the State and sets out the importance of providing positive measures in the legal system for eliminating discriminations.

1.4 The complicated relationship between the CRPD and the EU legal system

The ratification of the CRPD by the EU raises several and interesting questions regarding its legal status within the EU legal order. According to the Treaties, as far as international agreements are concerned, international law is an integral part of the EU legal order. According to Article 216(2) TFEU, "agreements concluded by the Union are binding upon the institutions of the Union and on its Member States". It would appear that EU law has embraced a monistic approach to regulate its relationship with international law. However, the Court of Justice's case law has revealed that the interplay between EU law and international human rights law is not properly defined yet.

In the case of *Z.*, the CJEU ruled that the CRPD's provisions are not unconditional and sufficiently precise and therefore do not have direct effect under EU law. The same approach has been confirmed in the case of *Glatzel*. The Court excluded that the UN Convention may be relied upon to challenge the validity of EU norms. The Court surprisingly concluded that the CRPD does not produce direct effects in the EU legal order since it is drafted in a programmatic form. In this respect, only those international treaties containing 'unconditional and sufficiently precise' provisions can produce direct effects. This condition is fulfilled where the international norm relied upon enshrines a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measures.

1.5 The state of play of the proposed Horizontal Directive

Another finding of this research is that the last Council's draft of the new Horizontal Directive significantly reduces the legal protection of persons with disabilities in comparison with the initial Commission proposal and the major amendments presented by Parliament.

The last Council's instrument removes the field of 'social advantages' from the material scope of the prohibition of discrimination. In addition, the express reference to the prohibition of multiple discrimination has been eliminated from the final draft leaving a crucial gap in EU equality law. The Council also removed the 'anticipatory' obligation to provide reasonable accommodation in workplace and specifies that housing providers are not required to make structural alterations to the premises in order to accommodate the needs of persons with disabilities. By contrast, the most remarkable legal improvements adopted by the Council concern the explicit recognition of discrimination by association and denial of reasonable accommodation as unlawful forms of discrimination.

The last Council's draft reflects a political compromise that favours those Member States (Germany in particular) that would be most affected by the financial impact of the Directive's adoption. However, several studies by the Commission prove that a new Horizontal Directive would not result in excessive economic costs for the Member States. Short-term costs of inclusion and integration would be compensated by long-term benefits in terms of GDP growth and taxes. In addition, several Member States advanced the subsidiarity argument to slow down the negotiations within the Council and obstruct the adoption of the final draft. This stance is not completely legitimate as Member States would retain their exclusive competences in the organisation of the areas covered by the Directive. The new Horizontal Directive would address the principle of equal treatment within the specific limits of the EU competences as the Race Directive already did in the past.

Member States should accelerate the negotiations for a definitive adoption of the proposed Directive. The negative trend of the CJEU's jurisprudence in dealing with the social model of disability and the substantive model of equality shows the necessity to update and reinforce EU equality law. In particular, the legislator should intervene to clarify the meaning of disability and introduce an explicit provision that prohibits multiple and intersectional discrimination in line with the CRPD.

1.6 Key recommendations for improving the interpretation of EU equality norms

The analysis of the CJEU's judgement reveals that the CRPD is not fully producing the expected results at EU level. A more coherent and progressive judicial approach is required in relation to the legal understanding of the concepts of disability and multiple discrimination. Moreover, the CJEU is minimising the impact of the CPRD in the EU legal system without properly clarifying the relationship between EU law and international human rights law. The following recommendations aim to improve the judicial interpretation of the EU equality norms and identify the legal status of the CRPD.

In the first instance, the CJEU is showing an unreasonable reluctance and prudence in its assessment of the equality norms contained under EU law. In doing so, it is again promoting the re-emergence of a medical or welfare model of disability according to which functional limitations are deemed to be a direct outcome of the individual impairment. Instead, the CJEU should consider not only an individual's biomedical deficiency, but also those external circumstances that hampers the enjoyment of fundamental rights. The CRPD makes clear that disability represents a social construct that should be interpreted in a broad manner. The *ratio* of the substantive model of equality is indeed to identify social barriers and address those relevant effects of the discriminatory treatments. To this end, it aims to ensure that differential characteristics are accommodated within the equality norms. The CJEU should not hesitate to recognise that structural disabling barriers are not located within the individual, but are often represented by environmental, attitudinal and legislative measures.

In addition, the Court's judgement in relation to multiple and intersectional discrimination negatively mirrors the limits of the single-ground equality model of EU law. Multiple and intersectional discrimination against women with disabilities occurs frequently in the labour market and a new holistic approach is needed to accommodate the individual experience of multiple disadvantages. In this respect, the Court should abandon a *formalist* comparative approach when deciding cases of

discrimination based on disability and gender. This approach fails to properly determine the *group* to whom the claimant should be compared with and the *object* of the comparison. The accommodation requested by the claimant (paid leave equivalent to maternity or adoptive leave) was not provided to any member of other groups of individuals (male workers). The judicial analysis should therefore focus on the *adverse impact* on the claimant of the discriminatory treatment (the failure to provide paid leave) rather than on the differential treatment the individual receives in comparison with others. A new 'substantive' and 'functional' approach aiming at addressing the *effects* of discriminatory measures is highly required to replace a 'formalistic' comparative model which is inadequate to tackle multiple and intersectional discrimination.

With regard to the legal status of the CRPD, the CJEU's reasoning demands the assessment of 'unconditional and sufficiently precise' provisions to ensure the direct effects of international treaties within the EU legal order. It may be said that the blanket application of this 'test' does not consider the legal complexity of an international human rights treaty such as the CRPD. It is worth noting that the CRPD represents an overarching human rights treaty that cannot share the same characteristics of those international agreements setting out technical standards. This approach reflects the 'protectionist' scope of preserving the EU legal framework from the interference of international human rights law. This understanding of the relationship between EU and international law conflicts with the formal openness of EU Treaties to others legal orders. Furthermore, the assumption that the CRPD's provisions are not precise enough is not fully accurate. The Convention not only introduces general obligations, but also specific substantive rights and implementation provisions which set forth explicit and well-defined obligations. Consequently, labelling the CRPD as a mere programmatic instrument is highly reductive. With this background, the CJEU should identify new criteria to assess the direct applicability of international provisions. To this end, the peculiar legal nature of the CPRD in comparison with other international agreements should be acknowledged. The CJEU should also

consider the CRPD's provisions as having direct effects because they set out specific substantive rights, obligations and procedures.

2. EU governance: main findings

With regard to the impact of the CPRD on EU governance, the key findings of this research are the following: i) the main flaw of the existing governance mechanisms is the 'reporting and benchmarking' process; ii) the EU independent framework reveals an excessive fragmentation; iii) the European Parliament is marginalised and the role of civil society organisations should be enhanced.

The governance mechanism put in place by the EU to comply with Article 33 CRPD mirrors the open method of coordination (OMC). In 2010, the European Commission launched the European Disability Strategy 2010-2020 in order to pursue its objectives with actions in eight priority areas. The approach to achieve these shared goals is based on voluntary political cooperation. Member States still retain a significant portion of autonomy in the adoption of national policies to accomplish the EU objectives. Member States are supported by the Commission's expertise and guidance in implementing strategic objectives. This framework raises several concerns in relation to the feasibility of the OMC in the disability sector. The main weakness of the EU governance mechanisms is represented by the 'reporting and benchmarking' process. Peer review and reporting are fundamental aspects of the OMC. Accordingly, governments should systematically release national plans to the Commission concerning the situation of persons with disabilities in their domestic system. National reports however have not mainstreamed disability in a comprehensive and coherent way. The majority of States did not provide clear and analytical evidence with regard to the implementation of disability policies. In doing so, the Commission cannot carry out any rigorous assessment of the rights of persons with disabilities at national level.

It has also been argued that the EU independent framework reveals an excessive fragmentation and decentralisation of competences and responsibilities. The EU governance mechanisms should be simplified in order to confer clear duties to those EU actors involved in the OMC and avoid the coexistence of several EU bodies with overlapping functions. In particular, the role of the European Parliament is marginal within the EU independent framework as it lacks formal structures to monitor the CRPD's implementation.

The Parliament is officially excluded from the drafting of the EU periodic report to the UN CRPD Committee and it does not participate in any procedures of the *de facto* vertical and horizontal coordination system between the EU institutions and Member States. Despite that, the EP promoted several political initiatives to foster the CRPD's implementation at EU level and encourage the participation of governmental and non-governmental stakeholders in the decision-making. To give an example, in 2016 the EP released a Resolution on the implementation of the CRPD as a follow up to the UN Recommendations to the EU. The EP urged a cross-cutting review of EU legislation and funding programmes to fully comply with the CRPD, an update of the declaration of competence in light of the Concluding Observations, a review of the European Disability Strategy and the development of a comprehensive EU CRPD strategy with a clear timeframe, benchmarks and indicators. Moreover, the EP and its committees have gradually improved the quality of their policy deliberation by means of regular consultations and public hearings with European Disability Forum and other NGOs. The participation of civil society organisations is a fundamental principle of good governance which aims to open up the decision-making process and promote the dialogue between EU institutions and civil society. The consultative process within the Parliament and its committees with regard to the CRPD's implementation shows the emergence of a beneficial interaction between the European Parliament and NGOs. However, the involvement of civil society organisations in the policy chain should be adequately resourced and structured to perform the crucial function of monitoring the CPRD's implementation in the EU.

2.1 The importance of reforming the EU independent framework

The OMC is not the correct tool to accelerate the implementation of the CRPD in the EU. It is not based on a comprehensive system of sanctions and the concrete achievement of its objectives depends upon the extent to which national plans are implemented by governments. The adoption of non-binding recommendations and atypical acts do not ensure the uniform application of EU rules in the Member States. However, the lack of hard sanctioning mechanisms should not represent an obstacle in a governance architecture that incentivises reciprocal learnings. The reporting methods and the coordination mechanisms of the OMC should be reinforced to promote the CRPD's implementation in the EU. The OMC is not seen as a panacea to implement the CRPD, but the improvement of certain mechanisms may contribute to facilitate the achievement of the Disability Strategy objectives. In doing so, Member States will remain responsible for a sensitive area where they are still reluctant to lose important portions of legislative power.

2.2 Key recommendations for improving the EU governance mechanisms

The Commission should relaunch the objectives of the Disability Strategy 2010-2020 in order to develop precise timeframes and key performance indicators. Such instruments will be useful for identifying good practices and for measuring countries' performances in the area of disability. In this regard, the European Agency for Fundamental Rights (FRA) may assist the Commission and the Parliament in adopting new policy strategies and indicators. The formulation of clear performance indicators by the EU institutions can facilitate the benchmarking process and improve the report mechanism. By doing so, Member States will be encouraged to deliver data on the impact of their policy measures. At the same time, the EU institutions will have the necessary tools to share good practices and evaluate Member State performance. In conclusion, the EU governance system designed to implement the CPRD should provide clear procedures to penalise non-cooperation by the Member States.

3. Good governance and participatory democracy: the CPRD's positive practice

A key finding of this research is that the CPRD's adoption proves that there are beneficial effects of the increasing participation of civil society organisations within international political processes. The contribution of civil society organisations to the drafting and monitoring of the CRPD's implementation represents good practice of participatory democracy that may be replicated at EU level.

Civil society organisations and NGOs have adequate advocacy and policy instruments to properly support stakeholders' concerns and provide specific information, expertise, analysis and reports to decision-makers. In this respect, NGOs have advanced influential proposals, criticisms and perspectives for building an effective framework for the protection of persons with disabilities. Their advocacy initiatives have significantly impacted the final draft of the CPRD. The most successful contributions of civil society organisations concerned the participatory democracy approach (Art. 4.3), the social model of disability (Art. 1) and the acknowledgment of multi-discrimination against women with disabilities (Art. 6). The participation of civil society groups has been regulated by structured and formalised procedures that ensured the effective functioning of the entire decision-making process. Firstly, the participation of NGOs in the Ad Hoc Committee's work has been granted to all non-governmental organisations enjoying consultative status within the UN Economic and Social Council. Secondly, their participation has been enlarged to those organisations who could prove they carry out relevant activities in respect to the work of the Committee.

With this background, a key recommendation is that the *ex-ante* establishment of certain requirements for structuring the participation of civil society is an essential pre-condition to put good governance at EU-level into practice. Inclusive and open procedures necessitate the involvement of actors in a high representative capacity. This assessment should be based on qualitative criteria, such as NGO capacity to represent common interests and carry out effective advocacy activities. A structured

participation would not jeopardise the independency of civil society organisations, and it would create the conditions needed to promote the participation of representative groups of individuals that can advance constructive dialogue and bring relevant expertise to the decision-making process. The model of participatory democracy adopted by the CRPD may be feasible for improving the EU decision-making process in those sensitive and technical areas related to human rights law.

4. Canada and the United States: main findings

The first key finding of the comparative analysis between the United States and Canada is that the US Supreme Court still adheres to a medical model of disability, whereas the Canadian Supreme Court has adopted significant decisions that promote a social understanding of disability and substantive equality.

4.1 Opposite understanding of disability

This study has demonstrated that the expectations around the ADA have not been fulfilled. Despite the enthusiasm surrounding the ADA's adoption, American courts apply a strict interpretation of the concept of disability and narrow the ADA's mandate. The ADA embraces a social model of disability that takes into account the interplay between the impairment of individuals and those external barriers that hamper their participation in society. The ADA also protects those individuals who meet the requirement of "being regarded as having such an impairment". The "regarded as" prong addresses discriminations based on a *stereotyped* or *misrepresented* perception of disability. Nevertheless, the Supreme Court did not acknowledge the social model of disability enshrined in the ADA and adopted a highly restrictive approach to statutory coverage. The decision in *Sutton v. United Airlines* symbolises the emergence of a sort of judicial backlash against the ADA. The Supreme Court maintained that an individual can fall under the ADA's definition of disability only if he or she sufficiently alleges to be regarded as substantially limited in the major life activity of working. In doing so, the Supreme Court introduced a "demanding standard" to assess whether an individual can

be considered as having a disability. This approach considerably limits the protection of persons with disabilities and brings about significant legal obstacles to address disability discrimination. American judges show a sceptical and conservative stance towards the socio-political conception of disability and the substantive model of equality. The Supreme Court seems to endorse a medical or welfare perspective of disability according to which persons with disabilities are still seen as objects of charity.

By contrast, the Canadian Supreme Court has developed an extensive understanding of disability in compliance with the CPRD. In *Mercier*, the Supreme Court emphasised a flexible and broad definition of disability that takes into account several factors such as evolving biomedical, social and technological developments. The multidimensional approach towards disability embraced by the Supreme Court represents a landmark interpretation of a complex and evolving phenomenon that requires different levels of analysis and intervention. This judgement is remarkable as it anticipates those crucial and innovative developments introduced by the CRPD with regard to substantive equality and the social model of disability.

4.2 Identifying the correct nature of reasonable accommodation

The second main finding of the comparative analysis is that the interpretation of the duty to provide reasonable accommodation given by the Canadian Supreme Court represents a leading model for the judiciary to correctly implement the substantive model of equality. The Supreme Court's approach towards the notion of reasonable accommodation instead remains controversial and mirrors a formal model of equality which does not ensure the removal of those external barriers that hinder the full participation of persons with disabilities in the workplace.

The American Supreme Court adopted rigid standards to fall under the protection of the ADA and apply the subsequent obligation to provide reasonable accommodation. In *Airways Inc. v Barnett*, the Court concluded that accommodating persons with disabilities may generate arbitrary treatments in

the workplace, reinforce employer discretion and frustrate non-disabled employees' contractual rights or expectations. The Supreme Court's interpretation promoted the labour goal of restricting employer discretion over equal opportunities policies and equality norms. In addition, the Supreme Court highlighted the negative implications that may affect non-disabled co-workers when employers are called upon to accommodate marginalised groups of individuals. This reasoning is based on the idea that minority groups are in a privileged position in comparison with other groups. The case law relating to the ADA indeed shows that the concept of reasonable accommodations is regarded by the Supreme Court as a means to provide preferential treatment for persons with disabilities. The reasonable accommodation obligation is perceived as a charitable provision demanding burdensome and positive actions on employees. This understating reflects the Supreme Court's approach to the duty to make reasonable accommodations for the religious needs of employees. In the case of *Trans World Airlines, Inc. v. Hardison*, the plaintiff requested to have Saturdays off since according to his religion he needed to observe the Sabbath. The Court expressly stated that this accommodation would have triggered an "unequal treatment" of workers granting a *privilege* to those individuals who claim Saturdays off for religious reasons.

On the other hand, the judicial approach of the Canadian Supreme Court in *Meiorin*, *Grismer* and *Moore* positively emphasises a concept of reasonable accommodation that requires a structural change of the legal framework by challenging able-bodied norms and introducing diversity in all new norms. The Canadian Court's judgements reveal a profound understanding of the duty to accommodate, in line with international human rights law. The Canadian Court rightfully points out that the scope of the obligation to accommodate is to assess the failure to remove barriers to persons with disabilities. It therefore disregards a formal model of equality that considers reasonable accommodation as only a negative duty that precludes comparable situations from being treated differently.

4.3 Key recommendation for promoting substantive equality

The key recommendation here is to consider the interpretation of the Canadian Supreme Court as a 'good practice' for understanding and implementing equality provisions related to persons with disabilities.

It positively embraced a definition of 'handicap' that encompasses the socio-political dimension of being disabled and recognised that "disability may exist even without proof of physical limitations". Moreover, the Canadian Supreme Court correctly identified the legal nature of the duty to accommodate. The judicial analysis focused on the *adverse impact* on the claimant of the failure to provide such adjustments rather than on the differential treatment the individual receives in comparison with others. This interpretation is in line with a substantive model of equality demanding the realisation of positive actions to ensure the full enjoyment of human rights to persons with disabilities. This approach significantly differs with the interpretation of the U.S. Supreme Court which refrains from applying the civil rights model introduced by the ADA. American courts are unreceptive to the requirements of providing affirmative measures and different treatments for persons with disabilities.

5. The UK and Italy: main findings

The case law analysis concerning the interpretation of the reasonable accommodation's duty in the UK and Italy reveals the emergence of two divergent judicial approaches. British courts are moving away from the remarkable decision handed down by the House of Lords in *Archibald* in order to adhere to a formal paradigm of equality, whereas Italian courts are adopting a substantive approach to equality in compliance with the CRPD.

5.1 Positive and negative practices in implementing the duty to accommodate

British courts are gradually abandoning the substantive model of equality in favour of the traditional paradigm of equality. Reasonable accommodations are still perceived more as a privilege rather than a right for workers with disabilities. In *Wade v. Sheffield Hallam University*, the EAT held that it was not reasonable to remove the requirement for competitive interviews and move the employee to a new position. The UK Court denied the possibility to tailor the employer's absence policy to persons with disabilities who are on long-term sick leave. In doing so, the Court's judicial reasoning failed to consider that workers with a disability run the additional risk of an illness connected with their disability and they are therefore more exposed to the risk of accumulating days of absence on grounds of illness. Absence management policies should consider the specific needs of workers with disabilities in order to not place them at a substantial disadvantage in comparison with persons without disabilities. The UK Court's approach jeopardises the scope of equality law and the nature of the obligation to provide reasonable accommodation. The scope underlying the reasonable accommodation's duty is to ensure full equality by adopting specific measures to prevent or compensate for disadvantages linked to disability.

By contrast, Italian judges have positively embraced an *objective* and *functional* understanding of the duty to provide reasonable accommodation in compliance with the CRPD. In the case of *CG v L. SRL*, the Court found that the employer should have allocated the worker with disabilities to a different position in the company, because this measure would have been reasonable both for the company organisation and the disabled employee. The Court considered both the financial consequences for the employer and the effects of the adjustment requirements on others workers. This reasoning is highly coherent as it balances the necessity of removing a particular barrier for the worker with disabilities and the proportionality of the measure that should not impose an undue burden on the employer. This judicial understanding of the obligation to provide reasonable accommodation represents a valuable practice that may contribute to align the Italian jurisprudential

approach towards those international and EU standards for the protection of the rights of persons with disabilities.

5.2 The impact of international and EU law in the domestic system

The second key finding is that international and EU law have a more relevant and significant impact on the Italian legal system than on the British system.

The pure dualistic system that characterises the UK legal framework jeopardises the enforceability of supranational law. At judicial level, it may be argued that judges are reluctant to apply the norms of the CPRD. It has been shown that UK courts do not refer to the Convention in order to interpret the concept of reasonable accommodation. This protectionist approach may not only lower the legal protection of persons with disabilities, but it is also detrimental in relation to those legal gaps affecting the 2010 Equality Act. The case law analysis outlines that UK judges hesitate to explicitly mention EU law provisions to apply national legislation or fill the gaps of the Equality Act. It may be concluded that the UK judiciary is characterised by the emergence of a protectionist approach with regard to supranational law that limits the impact of EU and International law in the domestic system.

The Italian case law shows a more positive and open approach towards supranational norms in comparison with the UK. The CRPD is gradually impacting the judicial interpretation of domestic law that concerns the rights of persons with disabilities. Italian judges are more likely to explicitly refer to the provisions of international law when deciding complicated issues that are not properly regulated at national level. This approach reflects the fact that international obligations have an "infra-constitutional" nature and must be considered as interposed standards between the Constitution and ordinary law. To the same extent, Italian judges expressly mention CJEU's judgements and the Directive 2000/78 to solve those interpretative issues caused by the lack of specific legal provisions under Italian law defining the concept of reasonable accommodation. This research has revealed that Italian judges consider EU law as a valuable tool to decide those domestic cases affecting the rights

of persons with disabilities on the workplace. This approach moves away from the protectionist judicial reasoning of UK courts and promotes a monistic legal system that integrates supranational and national norms.

5.3 Key recommendation for interpreting reasonable accommodation

This author recommends to adopt an *objective* and *functional* understanding of the duty to provide reasonable accommodation. This interpretation represents a remarkable model to correctly implement the concept of reasonable accommodation at national level. This legal obligation is often new for nearly all Member States and its implementation may frustrate the scope of substantive equality. Judges should carry out a functional analysis to verify whether the accommodation requested by the employee is feasible and proportional. Different factors, such as the size of the organisation, the cost of the accommodation, its impact on the general workplace and its positive effect for the employee should be comprehensively considered. However, the main goal of such adjustments is to facilitate the achievement of equality in the workplace. Accommodating workers with disabilities does not represent a mere charitable goal, but a legally enforceable right to ensure the full participation of persons with disabilities in the workplace on equal basis with others.

6. How long is the 'road to equality'?

The CRPD has undoubtedly influenced the judicial interpretation of equality norms at EU and national levels. However, eleven years since its adoption, the CRPD's full potential has still not been unleashed in order to achieve its ambitious goal to effectively foster equality for persons with disabilities in the EU legal framework. To this end, judiciary and policy makers must transpose the social understanding of disability and the substantive approach towards equality into concrete judicial and legal practices. Moreover, the improvement of the EU independent framework is an essential requirement to boost the effective monitoring of the CRPD's implementation in the EU and its Member States. It is clear that the 'road to equality' is not yet complete, but the emergence of positive

judicial approaches towards non-discrimination norms may facilitate and accelerate the translation of the CRPD's provisions into the EU legal system.

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